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D. A. Jeremy Telman

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A TRUISM THAT ISN'T TRUE? THE TENTH AMENDMENT AND EXECUTIVE WAR POWER

D. A. Jeremy Telman^{*}

[T]he Reigns of good Princes have been always most dangerous to the Liberties of their People. For when their Successors, managing the Government with different Thoughts, would draw the Actions of those good Rulers into Precedent, and make them the Standard of their Prerogative, as if what had been done only for the good of the People was a right in them to do, for the harm of the People, if they so pleased; it has often occasioned Contest, and sometimes publick Disorders, before the People could recover their original Right, and get that to be declared not to be Prerogative, which truly was never so.

— John Locke, *Second Treatise on Government*¹ “

I. INTRODUCTION

The Tenth Amendment to the United States Constitution provides that all powers not delegated to the government of the United States are reserved to the several states or to the people.² The sacred cow of federalism, this amendment has played a limited role in the constitutional history of the United States. It is invoked whenever congressional legislative powers threaten the independent law making power of the several states. In that context, however, the Tenth Amendment does not tell us very much. After all, if powers are not delegated to the federal government, where else would they reside but in the states? Accordingly,

^{*} Associate, Sidley, Austin, Brown & Wood, New York, New York. B.A. 1985, Columbia University; Ph.D., 1993, Cornell University; J.D., 1999, New York University School of Law. Portions of this Article draw on research that I conducted while a Junior Fellow with the Center for International Studies at the New York University School of Law. That research was directed towards addressing the difficulties involved in reconciling the United States' participation in collective security regimes with the constitutional allocation of war powers. I am grateful to Christopher Eisgruber, Louis Fisher, Thomas Franck, David Golove, David Malone, Matthew Morris, Georg Nolte, Jay Parker, and John Yoo for their comments on earlier versions of this Article.

1. John Locke, *Second Treatise* § 166, in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 396 (Peter Laslett ed., 1967).

2. U.S. CONST. amend. X.

the Supreme Court has criticized the Amendment as a truism.³

However, the consequences of this truism are not as simple as they first appear. When one reads the text of the Tenth Amendment it is difficult to imagine that anyone could argue that it applies only to Congress' power and not to all branches of the federal government. Nonetheless, the doctrine of inherent executive authority, a theoretical relic from the constitutional monarchies which supplied some of the raw materials for the United States' system of governance,⁴ is enjoying a renaissance in debates over the allocation of war powers. According to the theory of inherent executive authority, certain powers are unique to the sovereign. Consequently, those powers reside in the federal Executive and require no constitutional delegation. This theory implies that the doctrine of limited government, which finds its clearest constitutional expression in the Tenth Amendment, applies only to the Congress. By attempting to provide an extra-constitutional source for executive power, advocates of the theory of inherent executive power transform the Tenth Amendment into a truism that is not true. For them, a power that is not delegated to any branch of the federal government is not reserved to the states or the people if it is part of the inherent power of the Executive.

This argument ought to scandalize devotees of the Tenth Amendment. More scandalous still, in the context of war powers debates, advocates of inherent executive authority lay claim for the Executive, powers expressly delegated to Congress. Because the Constitution allocates limited war powers to the President, debates over the allocation of war powers are often said to take place in a "zone of twilight" where the Executive and the Legislature have concurrent power or where the allocation of powers between them is left unclear in the Constitution.⁵ But the Constitution expressly delegates to Congress numerous war

3. *United States v. Darby*, 312 U.S. 100, 124 (1941). The Supreme Court stated that: The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Id.; see also John R. Vile, *Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445 (1996-1997) (exploring the fate of the Tenth Amendment in Supreme Court decisions since 1941).

4. See the discussion of the theory of inherent executive authority *infra* accompanying notes 215-36.

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

powers, and the Tenth Amendment prevents the re-allocation of those powers back to the Executive based on some anterior theory of inherent executive power.

The Tenth Amendment is a truism with respect to federalist doctrine, as it does nothing to alter the distribution of powers between the federal government and the states. This Article does not propose that we ought to consider altering the distribution of war powers between the federal government and the states. Instead, this Article explores the ramifications of the Tenth Amendment, viewed as a general statement of the principle of limited government, for the allocation of war powers between the two political branches of the federal government.

Specifically, this Article argues that the theory of inherent executive powers, on which arguments for unilateral, non-defensive executive war powers rely, cannot be reconciled with the theory of limited government embodied in the Tenth Amendment; therefore, unilateral, non-defensive executive war powers are not permitted under the United States Constitution. Part I of this Article reviews the history behind the adoption of the Tenth Amendment and discusses its aims. The Tenth Amendment was designed to protect the states from encroachments by the federal government on their independent sovereignty,⁶ and its Framers did not foresee it as a weapon in battles among the coordinate branches over the proper allocation of powers among them. But they also did not foresee the expansion of executive war powers that has occurred since World War II. Part I defends the more expansive use of the Tenth Amendment advocated here based on a view of the Tenth Amendment as a constraint on executive as well as legislative power.

Part II of this Article discusses textual and historical evidence in favor of congressional war powers and then considers two types of historical arguments for unilateral, non-defensive executive war powers. The first argument asserts the existence of a “quasi-constitutional custom,” which transforms the President’s traditional powers to “repel sudden attacks”⁷ into a general theory of executive control over the introduction of the United States Armed Forces (Armed Forces) into hostilities. Next, the

6. In defending the new Constitution against its anti-Federalist detractors, James Madison wrote: “The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.” *THE FEDERALIST* NO. 45, at 236 (James Madison) (Buccaneer Book 1992).

7. During the Constitutional Convention, James Madison suggested substituting the word “declare” for “make” in the constitutional enumeration of Congress’ war powers. The idea was that the President ought to have the power to repel sudden attacks. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 318 (Max Farrand ed., 1937).

Article addresses arguments that would derive unilateral, non-defensive executive war powers, in certain instances, from the United States' ratification of international instruments that obligate it to participate in collective security measures. This Article maintains that textual and historical arguments in favor of unilateral, non-defensive executive war powers fail on their own terms; they can be defeated without recourse to the Tenth Amendment. Nonetheless, such recourse is necessary because the textual and historical arguments ultimately rely on the theory of inherent executive authority.

Part III of this Article addresses the theory of unilateral executive authority. Here, the Tenth Amendment plays a crucial role in protecting Congress' unique war powers. Unilateral, non-defensive executive war powers cannot exist because the Tenth Amendment articulates a general doctrine of limited government and does not allow for the exercise of power by any branch of the federal government to which that power has not been explicitly or implicitly delegated. As the war powers in question are clearly allocated to the Legislature, they cannot be transferred to the Executive without an express delegation or a constitutional amendment. Because no such delegation or amendment has occurred, unilateral, non-defensive executive war powers violate the constitution.

Parts of this Article focus on the aims of the Framers in allocating war powers and in introducing the Tenth Amendment to the Constitution. This focus does not reflect a commitment to "originalism" as the optimal mode of constitutional interpretation. Rather, the purpose is to oppose those who have made inaccurate claims about original intention and to present a compelling account both of what the constitutional allocation of war powers is and what it ought to be.

The rise of administrative agencies has created a huge expansion of executive power. This Article does not question the legality of these administrative agencies; their existence can be reconciled with the theory of the Tenth Amendment presented here, so long as those agencies are created through explicit congressional grants of authority and Congress acts within its powers of delegation.⁸ If the Tenth Amendment can operate to refute claims of inherent executive authority, it has ramifications beyond the field of war powers. However, each conflict between the Executive and the Legislature over the allocation of powers

8. The non-delegation doctrine, dormant since the 1930s, may have been revived in a recent decision by the D.C. Circuit. See *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir.), *modified on reh'g by*, 195 F.3d 4 (1999), *cert. granted sub nom.* *Am. Trucking Ass'ns, Inc. v. Browner*, 120 S. Ct. 2193 (2000).

has its own particularities. This Article is limited to developing a strong case for the deployment of the Tenth Amendment against those who would use the theory of inherent executive power to proclaim the existence of unilateral, non-defensive executive war powers.

Since the advent of collective security regimes such as the North Atlantic Treaty Organization (NATO) and the United Nations Security Council (Security Council), the United States, with increasing frequency, has committed its Armed Forces to collective security activities using processes that engage the executive branch but bypass Congress' constitutional war powers. As a result, the post-war era, and especially the post-Cold-War era, has witnessed an unprecedented expansion of unilateral, non-defensive executive war powers. This expansion of executive war powers cannot be justified based on either the constitutional text or on the legislative history behind the Constitution. Scholars and representatives of the executive branch have generally proposed historical arguments in support of unilateral executive war powers, while scholars and representatives of the legislative branch have provided historical counter-arguments.

This Article argues first that all arguments in support of unilateral, non-defensive executive war powers rely on a theory of inherent executive authority that is without support in either the constitutional text or in the political history of the United States. The Article further contends that the theory of inherent executive authority cannot be reconciled with the Tenth Amendment, read not as a statement of federalist principles but as a general declaration that the powers of all branches of the federal government are limited to those delegated to them.

The Tenth Amendment limits not only what the branches of the federal government can do in light of the sovereign powers of the several states, it also limits what each branch of the federal government can do in light of the enumeration of powers contained in the Constitution. So read, the Tenth Amendment does not permit powers allocated to one branch of the federal government to be transferred to another branch absent a clear and constitutionally-sanctioned delegation. Accordingly, the Tenth Amendment commands that the Executive may not commit the United States Armed Forces to non-defensive measures absent congressional approval of those measures.

II. THE UNDISCOVERED TENTH AMENDMENT

I did not suppose, and I am not persuaded, that history leaves it open to question, at least in the courts, that the executive branch, like the Federal Government as a whole, possesses only delegated powers.

— Justice Jackson, *Youngstown Sheet & Tube*⁹

A. Aims and Purposes of the Framers

The second of the Articles of Confederation guaranteed each state its “sovereignty, freedom and independence.”¹⁰ Article II went on to state that “every power, jurisdiction and right, which is not by this confederation *expressly* delegated to the United States” is retained by the states.¹¹ Many anti-Federalists wanted an amendment to the Constitution that would provide protections of state sovereignty similar to those afforded by Article II.¹² When presented with the Constitution for ratification, six states recommended an amendment along the lines of the Tenth Amendment.¹³ Five of those states submitted drafts that would have limited the federal government to the exercise of “expressly” delegated powers, and one draft called for the federal government to exercise only “clearly” delegated powers.¹⁴ It is no coincidence that James Madison, who drafted the final version of the Amendment, came from Virginia, the only state that proposed an amendment that did not specifically limit the federal government to the exercise of expressly delegated powers.¹⁵ Madison himself viewed the amendment as “superfluous” and “unnecessary,” but he conceded, “there can be no harm in making such a declaration.”¹⁶

In 1789, Representative Thomas Tucker of South Carolina proposed adding the word “expressly” prior to “delegated” in the text of the Tenth Amendment, in order to clarify the extent to which the states retained

9. 343 U.S. at 640 (Jackson, J., concurring).

10. ARTICLES OF CONFEDERATION, art. II (1781).

11. *Id.* (emphasis added).

12. Vile, *supra* note 3, at 448.

13. Charles A. Lofgren, *The Origins of the Tenth Amendment: History, Sovereignty, and the Problem of Constitutional Intention*, in CONSTITUTIONAL GOVERNMENT IN AMERICA 331, 347 (Ronald K.L. Collins ed., 1980).

14. *Id.*

15. *Id.*

16. 1 ANNALS OF CONG. 459 (J. Gales ed., 1789).

their powers.¹⁷ Madison opposed the change, arguing that the Constitution must allow the government to exercise implied powers because a constitution could not descend into the minutia of the exercise of the federal powers.¹⁸ Tucker's proposal was defeated without a vote, and a similar proposal brought by Elbridge Gerry of Massachusetts was defeated by a vote of thirty-two to seventeen.¹⁹

In contrast to Article II of the Articles of Confederation, the Tenth Amendment is, by design, an anemic protector of federalist principles. The difference can only be understood as the product of the Framers' design for a much heartier form of federal union in the new Republic. When federalist issues have arisen in case law, the amendment has tended to lose out to the more muscular provisions of Article I, the Commerce Clause, and the Necessary and Proper Clause.²⁰

To those for whom Article II of the Confederation provided a model for the delineation of the division of powers between the federal government and the states, the final version of the amendment exacerbated the centralizing tendencies of the new government.²¹ However, none of the Framers ever expressed any doubt that the Tenth Amendment, to the extent that it stands for anything, limits the powers of the entire federal government, not just those of its legislative arm, to those powers named in (or implied by) the Constitution. The purpose of

17. *Id.* at 790.

18. *Id.*

19. *Id.* at 797.

20. For the first dramatic showdown between the Tenth Amendment and the Necessary and Proper Clause, see *McCulloch v. Maryland*, 17 U.S. 316 (1819), which held that the Necessary and Proper Clause grants Congress the power "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government." *Id.* at 420. The Supreme Court has allowed extraordinary expansions of Congress' Commerce Clause power over objections based in the Tenth Amendment. See, e.g., *Fry v. United States*, 421 U.S. 542, 547 (1975) (allowing Congress to regulate intrastate economic activity if such activities have cumulative effects on interstate or international commerce); *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 262 (1964) (permitting congressional preemption of express state laws affecting private commercial activities so long as the means chosen by Congress are reasonably adapted to a permissible constitutional end); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the application of amendments to the Agricultural Adjustment Act of 1938 to the production of homegrown wheat); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (recognizing Congress' power to regulate intrastate activities that have such a close and substantial relation to interstate commerce that their regulation is essential to protect interstate commerce from burdens or obstructions); *Gibbons v. Ogden*, 22 U.S. 197 (1824) (stating that the commerce power is vested as absolutely in Congress as it would be in a single government whose powers were restricted as the Constitution restricts our federal government).

21. See Lofgren, *supra* note 13, at 349.

the Tenth Amendment was to limit the powers of the federal government and to protect the sovereign prerogatives of the several states. The Framers did not intend the Tenth Amendment to effect a limitation of Congress' power alone. James Iredell, speaking at the North Carolina Ratifying Convention in 1788 thus repeatedly stressed that powers not delegated to Congress "or to the departments of the general government" are retained by the states.²² The version of the Tenth Amendment that was ratified and included in the Bill of Rights states simply that the powers not delegated to the United States are reserved to the states and to the people.²³ The amendment does not restrict itself to establishing limitations on any particular branch of the federal government.

B. Deploying the Tenth Amendment

Few constitutional provisions have elicited as little commentary as has the Tenth Amendment.²⁴ Much of what has been written focuses on the question of whether the Tenth Amendment actually adds something to the Constitution, and these writings generally pit the Tenth Amendment against the Commerce Clause and the Necessary and Proper Clause in order to determine whether the Constitution limits the federal government to the exercise of its expressly enumerated powers or permits the exercise of implied powers as well.²⁵

22. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 249 (Jonathan Elliot ed., 2d ed. 1996).

23. U.S. CONST. amend. X.

24. There are few works that devote a great deal of space to the interpretation of the Tenth Amendment. See, e.g., RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 77-87 (1987); Vile, *supra* note 3; Eugene W. Hickok, Jr., *The Original Understanding of the Tenth Amendment*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 455 (Eugene W. Hickok, Jr., ed., 1991); Murray Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 CONSTITUTIONAL COMMENTARY 233 (1987); Lofgren, *supra* note 13; Walter Berns, *The Meaning of the Tenth Amendment*, in *A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM* 126 (Robert A. Goldwin ed., 1963). See Lofgren, *supra* note 13, at 331 (noting that a survey of Supreme Court decisions through 1972 allocated only eight pages to a discussion of the Court's Tenth Amendment jurisprudence, while 140 pages were devoted to the Commerce Clause and 255 pages to the Fourteenth Amendment) (citing CONGRESSIONAL REFERENCE SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 1263-71 (1973)).

25. Raoul Berger argues against the received wisdom that the Tenth Amendment is a mere truism. According to Berger, the Amendment "was added to put the obvious beyond peradventure." BERGER, *supra* note 24, at 80. That is, it strengthens the claim of the states that they retain powers not delegated. *Id.* Berger reads Madison's insistence

Joseph Story was among the first individuals to comment on the difference between the force of Article II of the Confederation, which limits the federal government to the exercise of powers expressly granted it, and the Tenth Amendment, which acknowledges that the federal government can legitimately exercise implied powers.²⁶ Story considered the amendment to be a mere affirmation of a necessary rule of constitutional interpretation:

Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty.²⁷

Following Story, Walter Berns argued that the Tenth Amendment has a declaratory function and provides a rule of constitutional interpretation rather than a rule of constitutional law.²⁸ Berns showed how the amendment might have had a greater effect on American federalism if it were interpreted to restrict the federal government to the exercise of expressly enumerated powers.²⁹ As it stands, the amendment tells us nothing about the relationship of congressional power to that of the states that was not already established in Article I.

Since the exercise of federal legislative power has given rise to the most frequent conflict with the powers of state governments, the Tenth Amendment, viewed as an instrument for protecting the states against encroachments by the federal government, has been invoked exclusively against congressional actions. In that context, however, the amendment is merely declaratory of the relationship between the federal government

that the word “expressly” be omitted as evidence of Madison’s intent to enable the Necessary and Proper Clause to do its work. *Id.* at 86. Berger concludes that the Amendment assured the “continuing vitality of the states as prime law makers in most affairs.” *Id.* at 87 (citing WILLIAM HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 40 (1970)).

26. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, § 1900 (1833) (“It is a general principle, that all corporate bodies possess all powers incident to a corporate capacity, without being absolutely expressed.”).

27. *Id.*

28. Berns, *supra* note 24, at 131-32, 145.

29. *See id.* at 133-36 (discussing *Calder v. Bull*, 3 U.S. 386 (1798), *Lane County v. Oregon*, 74 U.S. 71 (1868), and *Hammer v. Dagenhart*, 247 U.S. 251 (1918), three cases in which the Court has read the Tenth Amendment as if it limited the federal government to the exercise of expressly delegated powers, but criticizing those cases for misreading the Tenth Amendment).

and the states established in the text of the Constitution.³⁰

The question of where to draw the line between federal commerce powers and state sovereignty has caused the Supreme Court great difficulties. The latest cycle of reversals began in 1976, when, by a five to four vote, the Court for the first time invalidated an act of Congress on Tenth Amendment grounds.³¹ Justice Rehnquist, writing for the majority in *National League of Cities v. Usery*, declared that provisions of the Fair Labor Standards Act, which extended its wage and overtime provisions to state employees, violated the Tenth Amendment by impairing the states' "ability to function effectively in a federal system."³² Less than ten years after *Usery*, also by a five to four vote, the Court reversed itself.³³ Justice Blackmun, writing for the majority, concluded that "[a]part from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."³⁴ Justice Rehnquist wrote a one-paragraph dissent declaring, in essence, that

30. Echoing *Darby*, one commentator concluded that the Tenth Amendment was merely "[d]eclaratory of the overall constitutional scheme" and "had no independent force as originally understood." Lofgren, *supra* note 13, at 350. Another commentator similarly concluded that the Tenth Amendment provides no special protection for the states beyond what is implicit in the enumeration of powers itself. Dry, *supra* note 24, at 247.

31. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). The claim that this was the first case to rely solely on the Tenth Amendment to invalidate an act of Congress comes from Dry. Dry, *supra* note 24, at 235. In addition, Dry argues that on previous occasions, when the Court struck down acts of Congress on federalism grounds, it strictly construed one of Congress' enumerated powers and then buttressed that reading with the Tenth Amendment. *Id.* at 235 n.8. *Usery* overturned *Maryland v. Wirtz*, 392 U.S. 183 (1968), a case decided only eight years earlier. *Usery*, 426 U.S. at 855. Justice Blackmun's decisive concurring vote in *Usery* was lukewarm at best: "Although I am not untroubled by certain possible implications of the Court's opinion -- some of them suggested by the dissents -- I do not read the opinion so despairingly as does my Brother BRENNAN." *Id.* at 856 (Blackmun, J., concurring). In dissent, Justice Brennan claimed that the majority's treatment of the Tenth Amendment as an express declaration of a state sovereignty limitation on the federal government would require the Court to overrule fundamental cases such as *McCulloch v. Maryland*, 17 U.S. 316 (1819), and *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). *Usery*, 426 U.S. at 861-62 (Brennan, J., dissenting). According to Brennan, these cases "hold that nothing in the Tenth Amendment constitutes a limitation on congressional exercise of powers delegated by the Constitution to Congress." *Id.* at 862 (Brennan, J., dissenting).

32. *Usery*, 426 U.S. at 852 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)).

33. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

34. *Id.* at 550.

Usury would rise again.³⁵ So far, it has not.³⁶

As Article I contains its own detailed enumeration of the powers of the legislature, the Tenth Amendment is especially redundant with respect to Congress' powers. Article I makes it clear that Congress can only exercise the powers enumerated therein, including all powers implied from the enumeration through the Necessary and Proper Clause.³⁷ The Tenth Amendment, consistent with Article I, limits the federal government to the exercise of enumerated powers and powers implicit therein. Because the limitation of Congress' power is clear from Article I, the Tenth Amendment does important textual work only with respect to the executive branch of the federal government, whose limitations are not specifically enumerated in Article II.³⁸

35. *Id.* at 579-80 (Rehnquist, J., dissenting).

36. In *United States v. Lopez*, 514 U.S. 549, 551 (1995), the Court invalidated the federal Gun Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (Supp. V. 1988) ("GFSZA"), which made it a criminal act to bring a gun into a school. *Id.* The reasoning in *Lopez* was similar to earlier cases in which the Court argued that Congress had exceeded its powers under the Commerce Clause. The Tenth Amendment played its wonted supporting role in the *Lopez* decision. However, it is unclear that *Lopez* establishes a strong precedent for a serious restriction on Congress' power, since the Court's crucial swing votes, Justices Kennedy and O'Connor, filed a separate concurrence which seemed to require only that Congress make some colorable argument justifying its actions under the Commerce Clause. *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring). In the case of the GFSZA, Congress simply failed to make a case in the record that there was a link between guns in schools and interstate commerce. *Id.* at 580-83 (Kennedy, J., concurring). The Supreme Court imposed more substantial limitations on the Commerce Clause in *United States v. Morrison*, 529 U.S. 598, 602 (2000). In that case, the Court, citing *Lopez*, found that Congress had exceeded its Commerce Clause powers as well as its powers under section five of the Fourteenth Amendment in establishing a civil remedy in the Violence Against Woman Act, 42 U.S.C. § 13981. *Id.* The Court so found, despite extensive legislative history establishing a link between violence against women and a woman's inability to get the training, education, and experience necessary for full participation in interstate commerce. *Id.* However, in deciding this case, the majority did not discuss the Tenth Amendment. The dissenters touched on the Tenth Amendment only briefly. *Id.* at 648 (Souter, J., dissenting).

This is not to say that the U.S. Supreme Court has given up the federalist cause. On the contrary, it now protects states' rights through the Eleventh Amendment instead of the Tenth. *See, e.g., Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (holding that Congress lacks power to abrogate states' sovereign immunity from suit in federal court for alleged violations of the Americans with Disabilities Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 66-67 (2000) (holding that Congress lacks power to abrogate states' sovereign immunity from suit in federal court for alleged violations of the Age Discrimination in Employment Act); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (finding that Congress has no power under Article I to abrogate states' sovereign immunity from suit in their own courts).

37. U.S. CONST. art. I, § 8, cl. 18.

38. In addition, the Constitution provides that there must be one Supreme Court. U.S. CONST. art. III, § 1. However, while the Constitution generally provides that federal

The Tenth Amendment stands for the general proposition that the federal government is one of limited powers. As such, it cannot co-exist with the theory of inherent executive power. Because there is no question that the Constitution delegates powers over foreign policy and war to the federal government,³⁹ the Tenth Amendment raises no federalism issues with respect to the war power. However, because it imposes a limitation on all branches of the federal government, the Tenth Amendment addresses the separation of powers among the branches of the federal government and thus helps to determine which branch may exercise delegated powers. Powers delegated to the legislative branch must be exercised by that branch, absent lawful delegation or constitutional amendment. Nothing in the legislative or subsequent history of the Tenth Amendment contradicts this more expansive reading of its significance. Because war powers are allocated to Congress and not to the Executive, the Executive cannot exercise those powers without violating the Tenth Amendment.

The next part of this Article begins by establishing that the constitutional allocation of war powers clearly favors congressional control. To that end, the Article addresses textual and historical arguments regarding the constitutional allocation of war powers. Once that allocation is established, the Article returns to the issue that is at the heart of it: the Tenth Amendment refutes the argument that there are inherent executive war powers, on which all arguments for unilateral, non-defensive war powers ultimately rely.

III. WAR POWERS: ESCAPE FROM THE ZONE OF TWILIGHT

Whatever difficulties may arise in defining the executive authority in particular cases, there can be none in deciding on an authority

courts shall have jurisdiction over enumerated "cases, in law or equity," U.S. CONST. art. III, § 2, cl. 1, that jurisdiction is dependent on the establishment of lower courts, which Congress "may from time to time ordain and establish." U.S. CONST. art. III, § 1. Accordingly, with the exception of a few provisions for the original jurisdiction of the Supreme Court, U.S. CONST. art. III, § 2, cl. 2, the powers of the federal judiciary are limited to those powers that Congress has to delegate under Article I. The Article I enumeration thus, for the most part, sets out the outer limits of the judiciary's powers as well.

39. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts "Burma Law," which prohibited the Commonwealth of Massachusetts from engaging in trade with the Republic of Myanmar, on the grounds that the law was preempted under the Supremacy Clause and interfered with congressional statutes empowering the President to control United States' economic relations with Myanmar and to act in the interests of national security).

clearly placed by the constitution in another department.

— James Madison, *Helvidius Letter No. 2*⁴⁰

While the tendency of recent presidents to assert unilateral, non-defensive executive war powers has fueled a scholarly and political debate on the question of the constitutional allocation of war powers, the allocation of those powers is clear.⁴¹ Scholars who argue otherwise must overcome numerous textual and historical obstacles. The Constitution grants to Congress the power to declare war,⁴² but the President, as

40. James Madison, *Helvidius No. 2*, in 6 THE WRITINGS OF JAMES MADISON 151, 153 (Gaillard Hunt ed., 1906).

41. Most scholars who address this issue agree that the Framers granted war powers to Congress in order to check the Executive's power to embroil the country in war or other armed conflict. See generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* (1981); FRANCIS D. WORMUTH ET AL., *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986); Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1 (1998); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L. J. 597, 601, 612 (1993); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991). Other scholars stress the distinction between offensive and defensive war powers and argue for extensive presidential powers to defend the United States and its interests. Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. L. J. & PUB. POL'Y 533, 541-542 (1996); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994). A third group of scholars interprets Congress' war powers very narrowly. Eugene V. Rostow, "Once More Unto the Breach": *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, (1986); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) and defending the first position against the other two); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

42. U.S. CONST. art. I, § 8, cl. 11. John Yoo argues that the power to declare war is judicial and not legislative. Yoo, *Continuation of Politics*, *supra* note 41, at 248. By declaring war, Congress issues a judgment on a current status of relations; it does not authorize war. *Id.* Yoo's argument overlooks the fact that Congress' power to declare war includes the power to refuse to do so and thus to place limits on the use of force. Because of this power, a declaration of war is an authorization of war. See, WORMUTH, *supra* note 41, at 75-85 (discussing congressional refusals to authorize the President to use force). Yoo expands this argument and urges that American Presidents exercise the power known in the eighteenth century as the power to declare war. John Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1689 (2000). But see Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1652, 1660-62 (2000).

Commander-in-Chief, has the power to command the Armed Forces.⁴³ Acting pursuant to that authority, Presidents unilaterally have dispatched the Armed Forces abroad on over 200 occasions.⁴⁴ But the President also has the duty to faithfully execute the laws of the United States and to preserve, protect and defend the Constitution.⁴⁵ Thus, the President must abide by the laws duly established by Congress. This part of the Article seeks to show that the power to put the United States in a state of war, including the lesser power to commit the Armed Forces to conflicts short of war, resides with Congress.

A review of the constitutional text itself and of the writings of the Framers establishes their intention to entrust the war power to the Legislature. This intention is now obscured by over two centuries of history, during which Congress has often acquiesced in the unilateral executive authorization of the use of force. However, the fact that Congress has allowed the repeated abuse of executive power does nothing to legitimate the practice as a matter of law.⁴⁶ The Constitution does not authorize unilateral executive action outside of the context of necessary self-defense.⁴⁷ Congress can at any time re-assert its constitutional powers and put a stop to any unilateral executive use of force. Moreover, as argued in Part II, the Tenth Amendment stands for

(criticizing Yoo's interpretation of the Declare War clause).

43. U.S. CONST. art. II, § 2, cl. 1.

44. In 1973, Senator Barry Goldwater's legal assistant, Terry Emerson, published a list of "199 U.S. military hostilities abroad without a declaration of war." WORMUTH, *supra* note 41, at 143. For a more recent compilation, see ELLEN COLLIER, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-1989 (Congressional Research Service, 1989), reprinted in THOMAS FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS 650-667 (2d ed. 1993).

45. U.S. CONST. art. II, § 3.

46. While the advocates of unilateral, non-defensive executive powers point to these hundreds of instances in which Presidents have authorized the use of force without first consulting Congress, defenders of congressional powers point to authorities such as Felix Frankfurter and Earl Warren for the proposition that unconstitutional actions are not rendered legal through repetition. WORMUTH, *supra* note 41, at 133-34 (citing *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940); *Powell v. McCormack*, 395 U.S. 486, 546 (1969)).

47. The line between defensive and non-defensive military action is easily obscured. Nevertheless, Congress has never disputed the President's constitutional power to authorize the defensive deployment of the Armed Forces. Accordingly, even if there were no basis for unilateral *defensive* executive war powers, the President would have such powers as a matter of quasi-constitutional custom. I discuss the argument for unilateral non-defensive executive war powers, *infra*, text accompanying footnotes 95-147. While I am unconvinced by that argument in the context of non-defensive war powers, I am convinced that we have recognized the quasi-constitutional custom of defensive executive war powers.

the general proposition that no branch of the federal government can exercise powers that the Constitution has not allocated to it. The Constitution specifically grants numerous war powers to Congress. The Tenth Amendment provides that the Executive cannot arrogate those powers to itself.

A. *War Powers and the Constitutional Text*

The Framers repeatedly stated that Congress was to have the dominant role in decision-making processes that could ultimately embroil the United States in war and in military ventures short of war. In addition to the power to declare war,⁴⁸ the Framers also granted Congress the power to raise and support armies,⁴⁹ to provide and maintain a navy,⁵⁰ and to make rules for the regulation of the land and naval forces.⁵¹ The Constitution supplements Congress' power to declare war with powers to grant letters of marque and reprisal.⁵² These powers are now generally understood to give Congress control over undeclared as well as declared war.⁵³ Finally, Congress alone can appropriate funds for use by the Armed Forces.⁵⁴ In short, the textual evidence is overwhelming. The few scholars who have attempted to argue otherwise face an uphill battle.⁵⁵ There is no other area where the Framers made their intentions manifest through so many separate constitutional provisions.

Those who question congressional war powers often point out that

48. U.S. CONST. art. I, § 8, cl. 11.

49. U.S. CONST. art. I, § 8, cl. 12.

50. U.S. CONST. art. I, § 8, cl. 13.

51. U.S. CONST. art. I, § 8, cl. 14.

52. U.S. CONST. art. I, § 8 cl. 11. Letters of marque authorize trading vessels – public or private – to attack foreign ships or private vessels, whether during war or peace. Letters of reprisal similarly authorize the use of force by public or private forces to retaliate against a foreign sovereign. See Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 29, 30-31 (Gary M. Stern & Morton H. Halperin eds., 1994). Although the congressional powers of granting letters of marque and reprisal have rarely been invoked since the early nineteenth century, Jules Lobel argues that these powers are still relevant in the context of United States covert military operations. According to Lobel, Congress must authorize such covert actions because they fall within Congress' traditional non-delegable authority to issue letters of marque and reprisal. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1035-36, 1109 (1986).

53. Raven-Hansen, *supra* note 52, at 31.

54. U.S. CONST. art. I, § 8, cl. 19 (the Necessary and Proper Clause); U.S. CONST. art. I, § 9, cl. 7 (the Appropriations Clause).

55. See discussion *infra*, accompanying notes 192-214.

Congress has exercised the power to declare war on only five occasions.⁵⁶ Each time, the declaration came at the President's request.⁵⁷ The rarity of congressional declarations is less surprising when one considers that declarations of war "had gone out of fashion at least a hundred years before the Federal Convention met in Philadelphia."⁵⁸ In any case, the power to declare war constitutes a small part of Congress' war powers. The war powers painstakingly enumerated in Article I, Section Eight of the Constitution make clear the Framers' intention that Congress has control over all non-defensive uses of the Armed Forces.⁵⁹

By contrast, the Constitution allocates only paltry war powers to the Executive. Presidential war powers derive from the executive powers,⁶⁰ from the powers of the Commander-in-Chief,⁶¹ and from the foreign relations power.⁶² All of these powers are narrowly circumscribed. The records of the Federal Convention make clear that the Framers intended for Congress to take the initiative in war but for the President to have the power to defend the country, the power to "repel sudden attacks."⁶³

There is an important difference between the way Article I of the Constitution vests the legislature with power and the way Article II of the Constitution vests the Executive with power. Article I begins, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."⁶⁴ That introductory vesting clause, read together with the explicit enumeration in Section Eight of Article I, indicates the Framers' intention to limit the Legislature to those powers specifically enumerated. Article II begins, "[t]he executive Power shall be vested in a President of the United States of America."⁶⁵ Article II specifically lists

56. Louis Fisher counts eleven occasions on which Congress has declared war, but that includes the multiple declarations of war during World War I and World War II. Fisher, *Unchecked Wars*, *supra* note 42, at 1652.

57. Congress declared war on England in 1812, on Mexico in 1846, on Spain in 1898, and in the two World Wars. *Id.* at 1652. On at least one occasion, Congress has refused to declare war at the request of a President. In 1815, Congress refused President Madison's request for a declaration of war against Algiers. FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 42, at 27-28 (providing a historical background for Congress' decision not to authorize war). Congress instead authorized only limited action at sea. *Id.*

58. BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 34 (1998).

59. U.S. CONST. art. I, § 8, cls. 11-16.

60. U.S. CONST. art. II, § 1, cl. 1.

61. U.S. CONST. art. II, § 2, cl. 1.

62. The President's power in this realm can be derived from the treaty power, U.S. CONST. art. II, § 2, cl. 2, and the power to receive ambassadors, U.S. CONST. art. II, § 3.

63. FARRAND, *supra* note 7, at 318-19.

64. U.S. CONST. art. I, § 1.

65. U.S. CONST. art. II, § 1, cl. 1. The difference between the Article I and Article II vesting clauses has been called into question recently. Lawrence Lessig & Cass R.

some presidential powers, but advocates of unilateral executive powers interpret those specifically enumerated powers as mere instances of executive power and not the whole of it.⁶⁶ Alexander Hamilton was among the first to argue that the difference between the vesting clauses in the first two articles of the Constitution signals the Framers' intention to create inherent executive power.⁶⁷ James Madison disagreed, arguing that the Constitution vests but a few powers in the Executive and that it does not countenance the exercise of powers that are legislative in their nature by the Executive or vice versa.⁶⁸

Hamilton's argument was not seconded until well into this century, for reasons best articulated by Justice Jackson in his concurring opinion in the *Steel Seizure Case*. The Solicitor General, arguing on behalf of the government in that case claimed that Article I vests in the Executive all the executive powers of which the government is capable.⁶⁹ "It is difficult," Jackson quipped, "to see why the forefathers bothered to add several specific items, including some trifling ones."⁷⁰ After comparing the notion of inherent executive power to the powers enjoyed by George III, continental monarchs, and totalitarian dictators, Justice Jackson concluded, "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated."⁷¹ Like the Legislature, the Executive can exercise powers that are implicit in its

Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-49 (1994) (arguing that the vesting clause of Article II implicitly includes a "herein granted" provision similar to that of the vesting clause of Article I). For an extended refutation of Lessig and Sunstein and a defense of the theory of a unitary executive, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 547-75 (1994).

66. Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 196 (1988) (comments of Eugene V. Rostow).

67. Alexander Hamilton, *Pacificus No. 1*, in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38-40 (Harold C. Syrett et al. eds., 1969).

68. Madison, *supra* note 40, at 147-48. The same approach seems to have informed Justice Black's opinion in the *Steel Seizure Case*. Justice Black found Truman's attempt to seize control of the steel mills unconstitutional on the ground that "[t]here is no statute that expressly authorizes the President to take possession of property as he did here," *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952), and "it is not claimed that express constitutional language grants this power to the President." *Id.* at 587. *But see* Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 64-65 (1953) (criticizing Black's opinion as creating arbitrary principles for the purpose of disposing of a particular case).

69. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring).

70. *Id.* at 640-41 (Jackson, J., concurring).

71. *Id.* at 641 (Jackson, J., concurring).

delegated powers.⁷² However, the Executive cannot arrogate to itself war powers that the Constitution has delegated to the Legislature.

Any argument to the contrary ignores not only the overwhelming textual evidence but the historical context in which the Constitution came into existence. After their experience with the English monarchy, the Framers sought to prevent the war power from being vested solely in the Executive.⁷³ As James Madison put it, "[t]he constitution supposes . . . that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature."⁷⁴ The fact that Pierce Butler's recommendation that the power to initiate war be vested in the President received no second indicates the hostility among the Framers to unilateral, non-defensive war powers.⁷⁵ Madison wanted to go even further; he tried to prevent the President from having a role in negotiating peace treaties.⁷⁶ He feared a President might try to impede peace in order to derive "power and importance from a state of war."⁷⁷

The Constitution, an otherwise succinct document, is wordy on the subject of congressional war powers. Therefore, as Hamilton's advocacy of presidential war powers makes clear, the textual argument for non-defensive, unilateral executive war powers relies on the theory of inherent executive powers. The constitutional text makes clear that the Framers rejected that theory as incompatible with both the specific provisions of the Constitution and the Constitution's general design. That general design is for a limited federal government, a doctrine which, as the Tenth Amendment makes clear, applies to both the Legislature

72. One can accept the notion that the President has powers not *explicitly* delegated by the Constitution without embracing the theory of inherent executive powers. The federal government exercises both implied and explicit delegated powers. *Id.* at 640 (Jackson, J., concurring). See also 16A AM. JUR. 2D *Constitutional Law* § 234 (1998).

73. Thomas Jefferson wrote to James Madison, "[W]e have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." Thomas Jefferson, *Thomas Jefferson to James Madison*, in 15 THE PAPERS OF THOMAS JEFFERSON, 392, 397 (Julian P. Boyd ed., 1958) (footnote omitted).

74. James Madison, *Letter from James Madison to Thomas Jefferson*, Apr. 2, 1798, in 6 THE WRITINGS OF JAMES MADISON, 311, 312 (Gaillard Hunt ed., 1906). Madison expressed the same views during his Helvidius/Pacificus exchange with Hamilton: "The executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." James Madison, *Helvidius No. 4*, Sept. 14, 1793, in 6 THE WRITINGS OF JAMES MADISON, 171, 174 (Gaillard Hunt ed., 1906).

75. FARRAND, *supra* note 7, at 318.

76. *Id.* at 540.

77. *Id.* (statement of James Madison).

and the Executive.

B. War Powers in the Constitutional History of the United States

While the Constitution repeatedly and emphatically invests the legislative body with war power, individual members of Congress and the body as a whole have been singularly weak-willed in the defense of their constitutional prerogatives.⁷⁸ As a result, numerous scholars have developed arguments for the historical development of unilateral executive authority to initiate and control the decision to introduce the Armed Forces into hostilities for purposes other than self-defense. The historical evidence, however, indicates no tension between the constitutional text and historical practice.

1. The Historical Scope of Congressional War Powers

In the first decades of its existence, the Supreme Court gave a broad interpretation to Congress' war powers. In *Bas v. Tingy*,⁷⁹ the Justices, each writing separately, unanimously acknowledged Congress' power to commit the United States to full-fledged war through a declaration ("perfect war") or to more limited conflicts without a declaration of war ("imperfect war").⁸⁰ Justice Marshall, writing for the Court in *Talbot v.*

78. Congress' response to the terrorist attacks on the World Trade Center is typical. By a nearly unanimous vote Congress passed a resolution authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001" S.J. Res. 23, 107th Cong. (2001). Barbara Lee, a California Democrat, cast the one opposing vote, stating "I believe we must make sure that Congress upholds its responsibilities and upholds checks and balances. This is a representative democracy, and it's our responsibility." Peter Carlson, *The Solitary Vote of Barbara Lee: Congresswoman Against Use of Force*, WASH. POST, Sept. 18, 2001, at C1. The subtitle of the *Washington Post's* otherwise sympathetic account of Lee's actions is misleading, as Lee points out that she voted in favor of allocating forty billion dollars to fight terrorism. *Id.* Lee is the lone member of Congress to vote against what amounts to a total abdication of congressional oversight in the realm of war powers. Other members of Congress shared Lee's views but feared the political ramifications of voting their conscience. *See id.* ("I admire the courage of Barbara Lee," says Rep. John Lewis "Several other members wanted to be there also but at the same time, like me, they didn't want to be seen as soft on terrorism."").

79. 4 U.S. 37 (1800).

80. Justice Washington provides a lengthy discussion of the distinction between perfect and imperfect war. *Id.* at 40-41 (Washington, J., concurring). Justice Chase praises Congress for its "circumspection and prudence" in embarking on a "partial war" with France. *Id.* at 45 (Chase, J., concurring). Justice Paterson writes that United States vessels could engage in war "[a]s far as congress tolerated and authorized the war on our part." *Id.* (Paterson, J., concurring). *See* GLENNON, *supra* note 41, at 77-78 (commenting on *Bas v. Tingy* and other cases decided around the same time as having acknowledged

Seeman,⁸¹ stressed that the Constitution vests in Congress “the whole powers of war.”⁸²

The extent of congressional war power was first tested during the Quasi-War with France at the turn of the nineteenth century. Congress had authorized the President to seize armed French vessels and vessels sailing to French ports.⁸³ President Adams went beyond that congressional authorization, however, and ordered the seizure of vessels sailing to or from French ports.⁸⁴ When an American ship’s captain seized a vessel coming from a French port pursuant to the executive orders,⁸⁵ the owner of the French vessel sued for damages. Holding that the President could not order such seizures without congressional authorization, the Supreme Court held the captain liable.⁸⁶ This outcome indicates that once Congress has legislated on an issue involving the use of force it effectively occupies the field and precludes additional, unilateral executive action. Therefore, acts of war undertaken on Executive orders that exceed Congress’ explicit authorization are unlawful.⁸⁷

Congress can authorize war or the use of force without formally declaring war.⁸⁸ As early as the Quasi-War with France, and as recently as the Vietnam War and the Persian Gulf War, Congress passed statutes or resolutions authorizing the President to engage in military operations.⁸⁹ In the alternative, Congress can withhold its consent by

that Congress’ power to declare perfect war implies the power to authorize limited or imperfect war).

81. 5 U.S. 1 (1801).

82. *Id.* at 28.

83. 1 Stat. 561 (1798); FISHER, PRESIDENTIAL WAR POWER, *supra* note 41, at 18-19.

84. *Little v. Barreme*, 6 U.S. 170, 178 (1804). See GLENNON, *supra* note 41, at 3-8 (analyzing *Little* in its historical context).

85. *Little*, 6 U.S. at 176.

86. *Id.* at 179.

87. John Yoo argues that most commentators have misread or overstated the importance of these early Supreme Court decisions. For Yoo, the Court’s statements that lend support to the position that Congress exercises exclusive power over war are mere dicta. Yoo, *Continuation of Politics*, *supra* note 41, at 294, n.584. However, because I view the Court’s discussion of war powers to have been necessary to its determination of the outcome of these cases, I disagree with Yoo on this matter.

88. See WORMUTH, *supra* note 41, at 298-304 (listing statutes authorizing the President to use the Armed Forces from 1794 through 1956).

89. Yoo, *Continuation of Politics*, *supra* note 41, at 177, n.37 (citing the Act of May 28, 1798, Ch. 48, 1 Stat. 561 (France); Southeast Asia (Tonkin Gulf) Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by Pub. L. No. 91-672, S. 12 (Jan. 12, 1971) (Vietnam); Authorization for use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (Persian Gulf)). John Hart Ely concludes that Congress authorized each phase of the Vietnam War by repeatedly authorizing the expansion of the

passing a statute demanding an end to the use of force; it did so in 1993, forcing the withdrawal of the Armed Forces from Somalia.⁹⁰

In addition, Congress often expresses its approval of presidential actions by appropriating funds which allow such actions to continue,⁹¹ but such appropriations do not carry the same weight as an explicit authorization of the use of force.⁹² Because Congress must repeatedly appropriate funds for military actions,⁹³ Congress can order an end to these actions by denying appropriations for continuing them, as it did in

conflict. ELY, *supra* note 41, at 12.

90.

Pursuant to section 5(c) of the War Powers Resolution (Pub. L. No. 93-148, 87 Stat. 55, 50 U.S.C. §1541, §1544(c) (1994)), the Congress hereby directs the President to remove United States Armed Forces from Somalia by March 31, 1994 (unless the President requests and the Congress authorizes a later date), except for a limited number of members of the Armed Forces sufficient only to protect United States diplomatic facilities and citizens, and noncombatant personnel to advise the United Nations commander in Somalia.

H.R. CON. RES. 170, 103d Cong., 139 CONG. REC. 9039 (1993). For a discussion of the War Powers Resolution, see text *infra* accompanying notes 135-46.

91. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 177-81 (1994) (arguing that the power of the purse in national security is sweeping, though not plenary); Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case*, 79 AM. J. INT'L L. 912, 944-48 (1985) (proposing that Congress avail itself of its appropriations power to achieve the purposes of the War Powers Resolution without violating the Presentment Clause). Congress can also use its appropriations power to bargain with the President about foreign policy. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 74-75 (2d ed. 1972). In an argument based on the Coase Theorem, George Sidak maintains that Congress ought not to express approval of military actions by appropriating funds for them. See Sidak, *supra* note 41, at 65 (arguing that separation of powers can be violated through voluntary exchanges). If Congress approves of military action, it should either declare war or pass a statute authorizing the action. See *id.*

92. In early cases brought during the Vietnam War, courts treated appropriations as authorizations. See *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir. 1967); *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970); *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970). Later cases found that concern for the well-being of soldiers in the field might motivate members of Congress to appropriate funds for military actions that they opposed. See, e.g., *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973), *rev'd for lack of standing*, *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). See also, FISHER, PRESIDENTIAL WAR POWER, *supra* note 41, at 123-25 (providing historical background to this line of cases); ELY, *supra* note 41, at 27-30 (same).

93. For example, Congress appropriated over seven billion dollars for the Vietnam War in 1965 and 1966. ELY, *supra* note 41, at 27-28. In addition, Congress appropriated nearly one billion dollars for Operation Desert Shield. Yoo, *Continuation of Politics*, *supra* note 41, at 297.

the case of the Vietnam War through the Eagleton Amendment.⁹⁴ However, Congress generally will not refuse to fund an ongoing military operation, unless the operation is extremely unpopular at home. Even in the case of an unpopular operation, Congress will not endanger the Armed Forces in the field of war by cutting off funding without warning.⁹⁵

Such practical considerations can have no effect on the constitutional allocation of war powers. Advocates of unilateral, non-defensive war powers often ultimately rely on arguments of expediency. However, if the Tenth Amendment states a general principle of limited government, such arguments are unavailing in the face of clear constitutional dictates. As the foregoing section indicates, the Constitution specifically allocates numerous war powers to Congress.⁹⁶ Congress has consistently exercised these powers and has never renounced or delegated them. Consequently, both the constitutional text and constitutional history dictate that Congress retains the sole power to commit the Armed Forces to war or to armed conflict short of war.

2. *Historical Arguments for Executive War Powers*

While Presidents often use their power to commit the Armed Forces to hostilities, the general rule is that they may not do so without congressional approval.⁹⁷ There are, however, important exceptions to this rule. The President has always had the authority to use the Armed Forces defensively to repel sudden attacks, and this includes the authority to order rescues and limited actions to defend United States interests abroad. In addition, Congress often acquiesces in unilateral executive action by appropriating funds for such action. Such appropriations should not be interpreted as recognizing the legitimacy of unilateral executive actions. As the Supreme Court pointed out in its

94. 87 Stat. 134 (1973). The Eagleton Amendment states:

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in and over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.

Id.

95. The War Powers Resolution thus provides the President a thirty-day window, in addition to the sixty days the President has to get congressional approval for the use of the Armed Forces, which she may use to extricate the Armed Forces without endangering the lives of United States military personnel. War Powers Resolution § 5(b), 50 U.S.C. § 1544(b) (1994 & Supp. V 2000).

96. U.S. Const. art. I, § 10, cl.3.

97. *Id.*; U.S. Const. art. II, § 2, cl. 2-3.

Chadha decision, no amount of institutional impropriety can make an unconstitutional practice constitutional.⁹⁸ As a practical matter, however, Congress must confront the President in order to challenge Executive abuses of the war powers and to assert the constitutional right of Congress to make final decisions regarding the engagement of the Armed Forces in hostilities.

During the Cold War, advocates of executive war powers argued that the President as Commander-in-Chief had to be able to respond with alacrity and in secret to perceived threats to United States security.⁹⁹ In the era of “total war,” scholars have developed the notion that Presidents need to exercise “emergency powers” in order to protect the nation not only against actual sudden attacks but against the threat of force that could be used against civilian targets or vital United States interests.¹⁰⁰ But since Presidents have claimed to be exercising emergency powers in contexts ludicrously far removed from actual national emergencies,¹⁰¹ the notion of emergency powers is not useful. As Justice Jackson put it, “[the Framers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that

98. *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“[O]ur inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies.”).

99. In arguing in favor of recognizing the creation of new unilateral, non-defensive war powers created by the ratification of the U.N. Charter, one Senator pointed to the changing nature of war, leaving “no time for debates, consultations, and declarations.” 91 CONG. REC. 8, 11085 (1945) (statement of Sen. Johnson). The Senate Foreign Relations Committee, in explaining the need for the War Powers Resolution, concluded that Congress had failed to defend its war powers because of “three decades of almost uninterrupted crisis in foreign policy.” SENATE FOREIGN RELATIONS COMMITTEE REPORT ON THE WAR POWERS RESOLUTION, S. REP. NO. 93-220, at 8 (1973), *reprinted in* FRANCK & GLENNON, *supra* note 44, at 570, 573. Arguments in favor of presidential power to authorize pre-emptive strikes are far less compelling in the post Cold-War era.

100. For a critical commentary on this development, see generally Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989) (analyzing the historical expansion of the Executive’s emergency power to confront foreign dangers and arguing that the decline of constitutional constraints on executive power requires means of limiting emergency powers).

101. With some justification, President Truman declared a national emergency in response to the Korean conflict. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950). Less credibly, Oliver North justified covert aid to Nicaraguan contras based on vague claims of a nation “at risk” and a “disaster at hand.” JOINT HEARINGS BEFORE THE HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN AND THE SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, 100th Cong., 150, 194 (1987) (testimony of Oliver North).

emergency powers would tend to kindle emergencies.”¹⁰² There is no constitutional conception of emergency powers, and its introduction into discussions regarding the extent of executive powers is a bit of mischief that ought not to be entertained. The question is not when the President can assert emergency powers but when the President can legally exercise war powers.

The practice of unilateral presidential authorization of the use of military force is alleged to have emerged in what Justice Jackson described as a “zone of twilight” in which the President and Congress “may have concurrent authority, or in which its distribution is uncertain.”¹⁰³ In that zone of twilight, congressional quiescence invites or enables independent presidential action.¹⁰⁴ But the extent of the zone of twilight has been overstated. It exists only when Congress is silent. The President has the power to deploy the Armed Forces offensively without consulting Congress only if Congress does not object.¹⁰⁵ When Congress asserts its constitutional war powers, the Executive has no legal power with which to oppose it because the Constitution does not allocate war powers of this kind to the President, and the Tenth Amendment prohibits any branch of the federal government from exercising powers that are not allocated to it.

There are two types of historical arguments in support of (at times limited) unilateral, non-defensive executive war powers. Because I am unconvinced by the best arguments proposing that executive war powers can be reconciled with the constitutional allocation of powers, I conclude that these arguments depend implicitly on a theory of inherent executive authority, a theory that, as I argue in Part III, violates the principle of limited government articulated in the Tenth Amendment. In this section, however, the discussion is limited to showing why these historical arguments fail on their own terms.

102. *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

103. *Id.* at 637. (Jackson, J., concurring).

104. *Id.* at 637 (Jackson, J., concurring). Justice Rehnquist followed Justice Jackson’s reasoning in writing for the majority in *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981).

105. HENKIN, *FOREIGN AFFAIRS*, *supra* note 91, at 49. During the debates over the ratification of the U.N. Charter, Senator Wheeler pointed out the difference between the President’s actual power to take the country to war and his legal authority to do so. 91 CONG. REC. 7992 (1945) (statement of Sen. Wheeler).

a. *The Quasi-Constitutional Custom*

Advocates of unilateral, non-defensive war powers point to the hundreds of instances in which Presidents have authorized the use of force as establishing a “quasi-constitutional” custom legitimizing such unilateral, non-defensive war powers.¹⁰⁶ Those who make the historical argument do not rely on the constitutional text but instead argue that the constitutional allocation of war powers has been amended in practice. Abraham Sofaer concedes that “Congress clearly has the upper hand with regard to war, as it controls the means of warmaking, and can punish Presidents for disregarding its instructions.”¹⁰⁷ However, commenting on the President’s quasi-constitutional war powers, Harold Koh, who is not an advocate of unilateral, non-defensive war powers, concludes that although the Constitution “gives Congress almost all of the enumerated powers over foreign affairs,” while giving the President very few, Presidents traditionally have seized the initiative in foreign affairs.¹⁰⁸ Most defenses of executive power are thus based on a review of the history of unilateral executive decision-making regarding peace and war.¹⁰⁹ The strategy is one of obscuring the “is” and the “ought” or, more precisely, of arguing that because Presidents have often taken the

106. See KOH, NATIONAL SECURITY, *supra* note 41, at 67-100 (discussing the development of the quasi-constitutional custom of unilateral, non-defensive war powers). Louis Fisher notes that unilateral presidential military initiatives consist largely of “fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like.” Fisher, *Unchecked Wars*, *supra* note 42, at 1655-56 (quoting Edward S. Corwin, *The President’s Power*, in NEW REPUBLIC, Jan. 29, 1951, at 15, 16).

107. Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 35 (1995). Sofaer points out that the President’s power over foreign affairs allows him to lead the nation into conflicts or even to cause war. *Id.*

108. Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1292-93 (1988). See also John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1179 (1999). Yoo argues that:

The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations. Throughout courts have invoked the political question doctrine to avoid interfering in war powers questions.

Id. (footnote omitted).

109. One of the best-developed arguments is that of Abraham Sofaer: ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976). Sofaer’s arguments focus on the first thirty years of United States history. Others follow the same general approach and bring it forward into the twentieth century. See, e.g., Yoo, *Kosovo*, *supra* note 42, at 1676-85 (noting that Presidents have, since World War II, begun sending the Armed Forces into major conflicts without congressional authorization).

initiative in committing the Armed Forces to conflicts, the Executive has the legal authority to do so. But the argument from history has to be more rigorous than that. Otherwise any illegitimate practice could become legitimate through repetition. Justice Frankfurter's concurrence in the *Steel Seizure Case*¹¹⁰ establishes a three-part test for the legitimate expansion of executive powers.¹¹¹ First, the practice by the Executive must be systematic, unbroken, and long pursued.¹¹² Second, Congress must knowingly acquiesce in the practice.¹¹³ Third, the Executive may not violate any unambiguous constitutional commands or statutes.¹¹⁴ The historical argument fails because none of these prongs is satisfied.

The history of unilateral executive action in the early Republic is not pretty. Presidents act pursuant to vague congressional authorizations. Congress responds limply, either finding the presidential action authorized under some statute¹¹⁵ or, if no statute is handy, affording the President ex-post-facto relief by retroactively approving his actions and passing appropriate measures.¹¹⁶ However, both the early Presidents and the Congress knew when they danced around the Constitution in this manner that presidential military escapades undertaken pursuant to Executive orders require congressional approval and authorization. Early Presidents were sufficiently in tune with the sentiments of the

110. *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

111. Frankfurter stated that:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

Id. at 610-11 (Frankfurter, J., concurring); see also KOH, NATIONAL SECURITY, *supra* note 41, at 70-71.

112. *Youngstown Sheet & Tube*, 343 U.S. at 610 (Frankfurter, J., concurring).

113. *Id.* (Frankfurter, J., concurring).

114. *Id.* (Frankfurter, J., concurring); Raven-Hansen, *supra* note 52, at 32.

115. Sometimes Congress had to interpret statutes creatively in order to read them as justifying presidential action. For example, a House committee investigating President Monroe's authorization of the occupation of Amelia Island in order to oust a group that had taken control of the island and established it as a center for piracy and slave trade, concluded that Monroe's actions were justified by a law prohibiting the importation of slaves and by the No-Transfer Act. Sofaer, *Power Over War*, *supra* note 107, at 46.

116. For a different take on the history of war powers in the early Republic, see David P. Currie, *Rumors of War: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1 (2000) (reviewing, based on primary source materials, the history of what he calls "a number of brushfires short of outright war" during the Presidencies of James Madison, James Monroe, and John Quincy Adams, and concluding that these Presidents neither sought nor exercised unilateral war powers).

majority of United States citizens that they never engaged the military in a way that aroused concerted opposition. However, the fact that Congress approved of executive actions does not mean that Congress thereby relinquished its power to block unilateral executive action of which it disapproved.

Historical studies of the allocation of war powers in the early Republic demonstrate that both Congress and the early Presidents recognized that Congress alone had the constitutional power to authorize war. Abraham Sofaer, for example, argues that George Washington consulted only with his cabinet before taking decisions that could have resulted in war.¹¹⁷ According to Sofaer, Congress allowed Washington to take the lead in planning the foreign and military affairs of the nation.¹¹⁸ But Sofaer's narrative actually reveals that Washington acted in consultation with Congress and that he ordered the engagement of the military only pursuant to congressional legislation.¹¹⁹

As early as 1793, when the Governor of Georgia asked President Washington to send United States troops to intervene in border skirmishes between frontier settlers and Indians, Washington declined, explaining that "no offensive expedition of importance" could be taken without congressional authorization.¹²⁰ Washington's Secretary of War warned territorial governors that military operations were confined to defensive measures unless Congress decided otherwise,¹²¹ because Congress alone was "vested with the powers of War"¹²² and Congress alone was "competent to decide upon an offensive war"¹²³ There can be no doubt that President Washington understood the limitations of the constitutional grant of executive war powers.

Sofaer next claims that "Presidential use of military force increased

117. SOFAER, WAR, FOREIGN AFFAIRS, *supra* note 109, at 101-06.

118. Sofaer, *Power Over War*, *supra* note 107, at 40. Harold Koh notes that Washington's most controversial decision was the Neutrality Proclamation of 1793. KOH, NATIONAL SECURITY, *supra* note 41, at 78. That proclamation provoked the celebrated Pacificus/Helvidius debate between Hamilton and Madison, but, as a practical matter, Washington's decision had "overwhelming congressional support." *Id.* at 79.

119. SOFAER, WAR, FOREIGN AFFAIRS, *supra* note 109, at 120-27.

120. Letter from George Washington to William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick ed., 1939).

121. Letter from Henry Knox to Governor Blount (Oct. 9, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 195 (Clarence Edwin Carter ed., 1936).

122. Letter from Henry Knox to Governor Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 221 (Clarence Edwin Carter ed., 1936).

123. Letter from Henry Knox to Governor Blount (Mar. 23, 1795), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 389 (Clarence Edwin Carter ed., 1936).

substantially under Jefferson and his Republican successors.”¹²⁴ However, Sofaer also acknowledges that Jefferson “avoided measures that would have committed the nation to war.”¹²⁵ In fact, Jefferson’s understanding of war powers was no different from that of Washington. For example, Jefferson explained to Congress that an American Navy captain had disabled a Tripolitan pirate ship but had released the captured pirates because the Navy was not authorized to take non-defensive measures without the sanction of Congress.¹²⁶

James Madison took provocative actions in western Florida, proclaiming the area west of the Pearl River to be part of the Orleans Territory and directing that territory’s governor to take possession of the region on behalf of the United States.¹²⁷ His actions could have provoked war with Spain, but Henry Clay defended the President’s actions, pointing out that Congress had in 1803 provided for the occupation of the entire territory purchased from France.¹²⁸ Madison was thus merely executing the laws of Congress.¹²⁹ Whether or not Madison was correct in interpreting the reach of the Orleans Territory, neither he nor his supporters in Congress ever claimed that the President had unilateral authority to initiate hostilities in the interests of territorial expansion without congressional approval.¹³⁰

The annexation of west Florida was complete by 1812, but by the end of that same decade, the United States military was engaged in east Florida.¹³¹ During James Monroe’s presidency, Andrew Jackson launched a series of unauthorized attacks on the Seminole Indians in Florida, and Jackson then proceeded to attack Spanish forts when the Spanish proved unable to control the Seminoles in their territory.¹³² A debate over war powers ensued in the House of Representatives, but the House rejected all measures aimed at censuring the administration for its conduct. The Senate, while condemning Jackson for exceeding his

124. Sofaer, *Power Over War*, *supra* note 107, at 43.

125. *Id.*

126. Jefferson, *First Annual Message, Dec. 8, 1801*, reprinted in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, at 326-32 (James D. Richardson ed., 1903).

127. James Madison, *Proclamation of October 27, 1810*, reprinted in 1 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, at 480-81 (James D. Richardson ed., 1903).

128. Currie, *supra* note 116, at 9.

129. 22 *ANNALS OF CONG.* 6162 (1810) (statement of Sen. Clay).

130. Currie, *supra* note 116, at 10.

131. *Id.* at 11.

132. *Id.* at 12.

authority, took no action, and John Quincy Adams went so far as to praise Jackson for having made possible a long-sought treaty with Spain.¹³³ But Monroe reprimanded Jackson for exceeding his orders, reminding him that attacking the Spanish forts was an act of war to which the President was not competent.¹³⁴ Even Jackson's supporters agreed that neither he nor the President had the legal authority to initiate war against Spain; they merely contended that the occupation of Spanish forts was an act of necessity in the face of the Seminole threat.¹³⁵

Sofaer contends that Presidents exercised "concurrent authority to act in ways that could cause war."¹³⁶ They did so, however, in a defensive capacity – "protecting American nationals from Indians, or protecting American vessels from piratical activities."¹³⁷ In the first forty years of United States history, Presidents exercised the limited defensive war powers allocated to them in the constitutional system. Even when using this power, the early Presidents sought to work within guidelines established by congressional acts. Thus, after surveying the campaign against Caribbean piracy during the Monroe Administration, Sofaer concludes:

At no point during the first forty years of activity under the Constitution, did a President or any other important participant claim that Presidents could exercise force independently of congressional control. In fact, Congress demonstrated its capacity to control the President's use of force by delineating how and where force could be used during the Quasi-War with France, and by denying Monroe authority to use force to seize East Florida from Spain.¹³⁸

David Currie concludes more pointedly that:

[T]he express position of every President to address [war powers] during the first forty years of the present Constitution was entirely in line with that proclaimed by Congress in the War Powers Resolution in 1793: The President may introduce troops into hostilities only pursuant to a congressional declaration of

133. SOFAER, WAR, FOREIGN AFFAIRS, *supra* note 109, at 343-65.

134. Letter from James Monroe to Andrew Jackson (July 19, 1818), in 6 THE WRITINGS OF JAMES MONROE 58-59 (Stanislaus Murray Hamilton ed., 1900).

135. See Currie, *supra* note 116, at 14-15 (summarizing the arguments made by Jackson's supporters).

136. Sofaer, *Power Over War*, *supra* note 107, at 51.

137. *Id.* From a contemporary perspective, we would want to question the extent to which these military activities could be accurately described as "defensive." At the time, however, the characterization was not susceptible to dispute.

138. *Id.* at 50-51.

war or other legislative authorization, or in response to an attack on the United States.¹³⁹

Although Congress continued to acquiesce in the unilateral exercise of executive war powers throughout the nineteenth century, Presidents continued to seek congressional authorization for their actions, and Congress continued to demand, even if only after the fact, that its war powers be respected.¹⁴⁰ Thus, before declaring war on Mexico, Congress first censured President Polk for provoking the clash that made the declaration of war necessary.¹⁴¹ President Lincoln consciously exceeded his war powers at the beginning of the Civil War when he blockaded the seceding states and suspended the writ of habeas corpus while Congress was in recess.¹⁴² Knowing that he acted without constitutional authority, Lincoln requested that Congress ratify his actions, and it did so retroactively.¹⁴³ While acknowledging that Lincoln had authority to take military action in a civil war, the Supreme Court in the *Prize Cases of 1863* made clear that the President “has no power to initiate or declare war either against a foreign nation or a domestic State.”¹⁴⁴ The executive branch took the same position, stating at oral argument that “the right to *initiate a war, as a voluntary act of sovereignty*” is vested solely in Congress.¹⁴⁵

In sum, a review of the early history of the United States reveals that the early Presidents recognized that they could only legitimately exercise war powers in defending the United States against attacks on its territory, its possessions, or the Armed Forces. While early Presidents never acknowledged the Tenth Amendment as the source of that limitation, their understanding of the Constitution was entirely consistent with the interpretation provided here: the Constitution explicitly allocates the vast majority of war powers to Congress; such an allocation cannot be altered without violating the principles of limited government

139. Currie, *supra* note 116, at 1.

140. See generally FISHER, PRESIDENTIAL WAR POWER, *supra* note 41, at 13-44; Stromseth, *Understanding Constitutional War Powers*, *supra* note 41, at 866-68.

141. FISHER, PRESIDENTIAL WAR POWER, *supra* note 41, at 31-34.

142. *Id.* at 38-39.

143. *Id.* John Hart Ely distinguishes domestic rebellion from war and argues that Lincoln therefore did not need to invoke Presidential war powers in taking action against the South. The President has authority under Article II to “take Care that the Laws be faithfully executed,” and Congress had passed acts in 1795 and 1807 empowering the President to use the military to suppress insurrections. John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1390 n.34 (1988).

144. 67 U.S. 635, 668 (1863).

145. *Id.* at 660.

embodied in the Tenth Amendment. Only in the second half of the twentieth century have Presidents begun to claim authority to engage the military in non-defensive situations without congressional authorization. In doing so, the Presidents do not build upon existing historical precedents. To the extent that modern Presidents arrogate to themselves powers allocated to another branch of the federal government, they undermine the principle of limited government and violate the Constitution.

b. The War Powers Resolution

The Executive and Legislature have struggled over the proper allocation of war powers for the past two centuries.¹⁴⁶ This struggle responds to developments such as the changing nature of warfare and the rise of collective security regimes. The War Powers Resolution of 1973 (the Resolution),¹⁴⁷ passed in response to the perceived expansion of presidential war powers during the Vietnam War,¹⁴⁸ constitutes an important chapter in the history of that struggle and provides further evidence that Congress has never relinquished its constitutional war powers. The Resolution purports to “insure that the collective judgment of both the Congress and the President” will apply to decisions involving the use of force.¹⁴⁹ The Resolution calls upon the President to “consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated.”¹⁵⁰ If Congress does not either declare war or specifically authorize the use of the Armed Forces within sixty days of

146. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957, HISTORY AND ANALYSIS OF PRACTICE AND OPINION*, 171 (4th ed. 1957) (“[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”).

147. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1994 & Supp. V 2000).

148. ELY, *supra* note 41, at 48; ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* xi (1991). The Senate Foreign Relations Committee noted, “The transfer from Congress to the executive of the actual power — as distinguished from the constitutional authority — to initiate war has been one of the most remarkable developments in the constitutional history of the United States.” SENATE FOREIGN RELATIONS COMMITTEE REPORT ON THE WAR POWERS RESOLUTION, *supra* note 99, at 14.

149. 50 U.S.C. § 1541 (a)(1994).

150. War Powers Resolution § 3, 50 U.S.C. § 1542 (1994). This consultation is to take the form of a written report, submitted to Congress within forty-eight hours of any introduction of Armed Forces into hostilities in the absence of a declaration of war. War Powers Resolution § 4(a), 50 U.S.C. § 1543(a) (1994). The President is also obligated to report to Congress at least once every six months for the duration of the United States’ involvement in the hostilities. War Powers Resolution § 4(c), 50 U.S.C. § 1543(c) (1994).

the onset of hostilities, the President must terminate the use of the Armed Forces in the context reported upon.¹⁵¹ In the twenty-five years since the enactment of the Resolution, however, Presidents, with increasing frequency, have introduced the Armed Forces into hostilities without consulting Congress.¹⁵² They have done so either because they do not consider the actions they have taken to be covered by the Resolution or because they reject the Resolution as an unconstitutional encroachment on their war powers.¹⁵³

Although critics argue that the Resolution violates the separation of powers, the terms in which this argument is made reveal not only the constitutionality of the Resolution but also the need for it. Eugene Rostow, for example, argues that, "[t]here are times . . . when the President should not report to Congress or, indeed, to anyone else."¹⁵⁴ While it is true that the President sometimes has to authorize the use of force in order to defend the United States against sudden attacks, there is no situation in which the President would be justified in not reporting such a use of force to the full Congress. If Presidents believe Rostow's words, then the Resolution provides a critical mechanism for compelling them to consult with Congress and for guiding congressional checks on executive abuses of power.¹⁵⁵

151. War Powers Resolution § 5(b), 50 U.S.C. §1544(b) (1994 & Supp. V 2000). The statute allows the President an additional thirty days to extricate United States troops safely from the theater of war. *Id.*

152. In order to avoid triggering the Resolution's sixty-day grace period, Presidents have issued reports "consistent with" rather than "pursuant to" the Resolution. See Fisher & Adler, *supra* note 41, at 11; Yoo, *Continuation of Politics*, *supra* note 42, at 181-82. Six such reports are reprinted in FRANCK AND GLENNON, NATIONAL SECURITY LAW, *supra* note 44, at 591-98. When Presidents have made reports pursuant to the Resolution, they do so only after the military operations have been completed. Ellen Collier, *Statutory Constraints: The War Powers Resolution, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 55, 61 (Gary M. Stern & Morton H. Halperin eds., 1994).

153. The Resolution was passed over President Nixon's veto, and no President has openly acknowledged its constitutionality. Nixon's veto message is reprinted in FRANCK & GLENNON, NATIONAL SECURITY LAW, *supra* note 44, at 567-70. Scholarly works calling for the repeal of the Resolution include: ELY, *supra* note 41, at 132-38 (proposing revisions of the existing Resolution); TURNER, *supra* note 148, Fisher & Adler, *supra* note 41; Ely, *War Powers that Worked*, *supra* note 143 (proposing an alternative War Power Resolution); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 18 (1995). Members of Congress have also called for the repeal or revision of the Resolution. See, e.g., Joseph R. Biden, Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367 (1988).

154. Charles J. Cooper, *supra* note 66, at 195 (comments of Eugene V. Rostow).

155. A second argument against the Resolution is that its provision enabling Congress to order the President to remove the Armed Forces from theaters of war by concurrent resolution, War Powers Resolution § 5(c), 50 U.S.C. § 1544(c) (1994), may violate the

Liberal critics of the Resolution view the Resolution as a failure, as it has done nothing to reverse the expansion of unilateral executive war powers.¹⁵⁶ Liberals object not to the constitutionality of the Resolution but to its efficacy. By empowering the President to commit the Armed Forces to hostilities for sixty days without congressional authorization, the Resolution seems to give legislative approval to the President's power to take the country to war.¹⁵⁷ If the President, acting without congressional consent, can lawfully commit the Armed Forces to hostilities for sixty or ninety days, one reasonably may inquire into the basis for imposing any restrictions on the presidential war powers. The Resolution can thus be read to give explicit statutory approval to unilateral presidential war powers.¹⁵⁸

These criticisms ignore provisions of the Resolution that establish clear guidelines for the limitation of presidential war powers. The President can only exercise these powers pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories, its possessions, or its Armed Forces.¹⁵⁹ Notwithstanding the sixty to ninety-day grace period

Presentment Clause, U.S. CONST. art I, § 7, cl. 2. In *INS v. Chadha*, 462 U.S. 919 (1983), the Court struck down the legislative veto provision in § 244(c) of the Immigration and Nationality Act, because the Constitution permits legislation to be passed only by a majority of both houses and presentment to the President. *Id.* at 956-59. The legislative veto was held to violate that constitutional requirement. *Id.* at 959; see also *Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983), *aff'g*, 673 F.2d 425 (D.C. Cir. 1982) (striking down a provision of the Federal Trade Commission Improvements Act of 1980 that provided for Congressional disapproval by concurrent resolution). However, John Hart Ely has persuasively argued that section 5(c) could survive *Chadha*, because it does not provide for a legislative veto but, taken together with sections 4(a)(1) and 5(b) of the Resolution, approximates the intentions of the Framers, obligating the President to cease military activities if Congress does not approve. ELY, *supra* note 41, at 119.

156. ELY, *supra* note 41, at 48-49; GLENNON, *supra* note 41, at 94.

157. Fisher & Adler, *supra* note 41, at 1 ("The resolution . . . grants to the president unbridled discretion to go to war as he deems necessary against anyone, anytime, anywhere, for at least ninety days.").

158. *Id.* ("As Arthur Schlesinger Jr. has observed, before 'the passage of the resolution, unilateral presidential war was a matter of usurpation. Now, at least for the first ninety days, it was a matter of law.'") (quoting ARTHUR M. SCHLESINGER, JR., *IMPERIAL PRESIDENCY* 434-35 (1989)).

159. War Powers Resolution § 2(c), 50 U.S.C. § 1541(c) (1994). Ely criticizes this provision of the statute as merely hortatory and suggests that it might be improved if it could be made legally binding on the President. ELY, *supra* note 41, at 117. Ely ultimately finds this solution inadequate, however, and recommends the repeal of § 2(c). *Id.* Ely and others point out that section 2(c) unlawfully limits presidential war powers, since it does not allow for presidential action to protect American citizens abroad. *Id.* at 117-118; TURNER, *REPEALING THE WAR POWERS RESOLUTION*, *supra* note 148, at 109. I agree

created by the statute, the Resolution is powerless to prevent Congress from exercising its constitutional war powers and demanding the removal of the Armed Forces from any theater of war. The Resolution provides statutory authorization for the President's defensive war powers, but those powers remain circumscribed by congressional war powers. The Resolution thus preserves the constitutional allocation of power, and clarifies congressional power, by providing guidelines which circumscribe the President's options for unilateral action to those within the scope of her traditional defensive war powers.

Whenever the President contemplates committing the Armed Forces to hostilities, she has an obligation to consult with Congress. The President's obligation to Congress does not depend on the size of the intervention or the chances of escalation. Although Congress has generally acquiesced in the President's unilateral power to commit the Armed Forces to actions of limited scope, that acquiescence in individual cases, no matter how numerous, cannot result in a transfer of war powers from one branch of the federal government to another. Although the President may act unilaterally in order to repel sudden attacks, the Framers intended for the Legislature alone to authorize the deployment of the Armed Forces in all other contexts. The Resolution appropriately requires that the President report to Congress even when exercising her traditional defensive war powers.

In conclusion, the historical arguments fail to satisfy any of the three prongs of Justice Frankfurter's test for the legitimate expansion of executive powers. Outside of the context of national self-defense, the President has no constitutional authority to engage the Armed Forces without congressional consent. As the foregoing discussion of the quasi-constitutional custom indicates, Congress has either lent legitimacy to presidential action by passing authorizing legislation or by appropriating funds, or it has expressed its disapproval of unilateral executive action. Congress rarely chooses the latter route, however, in part because courts have been timid in supporting Congress in its attempt to protect its constitutional war powers, and in part because politicians are reluctant to appear to undercut the Armed Forces while they are engaged in combat. Nonetheless, the historical evidence is insufficient to support the argument that, because Presidents have repeatedly engaged the military without consulting with the Congress, the Executive is now endowed

and would preserve the Resolution but amend it so as not to interfere with the President's traditional authority to protect American citizens abroad. But the criticism is irrelevant, as the Resolution could do nothing to alter the President's long-recognized power to repel sudden attacks, which includes the power to use the Armed Forces to protect U.S. citizens.

with non-defensive constitutional war powers. There simply is no systematic, unbroken, and long-standing tradition of non-defensive, unilateral executive war powers.¹⁶⁰ Therefore, the first prong of Frankfurter's test is not met.

The Resolution demonstrates that the second and third prongs of Frankfurter's test also are not met.¹⁶¹ Congress has not acquiesced in unilateral executive authorization of the use of force; rather Congress has enacted legislation to protect its own war powers. By limiting the President's power to use military force to three enumerated situations, the Resolution expresses the clear command of Article I of the Constitution, which vests in the legislative branch the power to commit the Armed Forces to hostilities. Although Presidents frequently have engaged the Armed Forces on their own initiative, they have either done so in defensive contexts or they have acknowledged Congress' ultimate power to authorize the use of force. As none of the three prongs of Frankfurter's test are met, unilateral, non-defensive war powers cannot be established by means of the argument based on quasi-constitutional custom absent some theory of inherent executive power.

c. Collective Security and War Powers

Thomas Franck and Faiza Patel have suggested that the United Nations Charter (Charter) serves as a specific authorization for the exercise of unilateral, non-defensive executive war powers in the context of United Nations-authorized police actions.¹⁶² David Golove, while not persuaded by the Franck/Patel account, provides a sophisticated defense of parts of it based on Bruce Ackerman's theory of informal constitutional amendments.¹⁶³ Golove argues "that the adoption of the Charter constituted a decisive act of popular sovereignty that transformed the constitutional understanding of the war powers."¹⁶⁴ Golove thus "affirm[s] the President's unilateral power to use armed force in United Nations collective security actions."¹⁶⁵ If these scholars

160. See text, *supra*, accompanying note 101.

161. See text, *supra*, accompanying notes 102-03.

162. Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM J. INT'L L. 63 (1991); Thomas M. Franck, *Declare War? Congress Can't*, N.Y. TIMES, Dec. 11, 1990, at A27.

163. David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of War Powers*, 70 U. COLO. L. REV. 1491, 1522 n.117 (1999) (citing 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)); see also 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

164. *Id.* at 1492.

165. *Id.* Golove then provides three limitations to that unilateral Presidential

are correct, United States participation in collective security agreements effects a massive expansion of presidential war powers, since the United States increasingly deploys its military through participation in collective security measures. If the President can authorize such participation without first obtaining congressional authorization, the President can bypass congressional war powers on almost any occasion on which she might want to commit the Armed Forces to hostilities.

Part of the attraction of these arguments is that they facilitate United States participation in international peacekeeping operations while rejecting unilateral executive power to initiate war outside of the context of such operations.¹⁶⁶ According to these historico-theoretical arguments, Congress has delegated its war powers through ratifying and implementing collective security agreements. Rather than merely providing retrospective authorization for unilateral presidential actions, as Congress has in the past, by approving collective security arrangements, Congress has granted Presidents prospective authorization to engage the Armed Forces without first seeking specific congressional authorization. While it is not clear that the Constitution allows for such a delegation, no such delegation has occurred. Congressional war powers apply to United States participation in international police actions just as they apply to unilateral uses of the Armed Forces.

Franck and Patel offer a teleological interpretation of the Constitution that focuses on the Framers' aim of providing for an institutional check on executive power. The Framers were concerned that the decision to take the country to war should not rest with a single person, and within the domestic context the Framers imagined Congress was to provide the

authority:

First, it does not extend to large-scale commitments of the armed forces of the United States in major military actions Second, the President's authority is always subject to ultimate congressional control. Congress can adopt a resolution prohibiting him from participating in a particular United Nations action or generally in any United Nations action. Third, I do not premise the President's authority on a general power to make "little" wars.

Id. at 1492-93.

166. John Yoo is at a loss to explain why international legal scholars, who protested previous unilateral attempts by Presidents to commit the Armed Forces to collective security operations, had not objected to United States military intervention in Kosovo. John Yoo, *The Dogs that Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. 149, 155 (2000). Because Yoo's article ignores the positions discussed in this section, he exaggerates the uniformity with which international legal scholars have denounced unilateral presidential authorization of United States participation in collective security operations. Let there be no ambiguity here, however, I agree with Yoo that NATO intervention in Kosovo "violated the U.N. Charter and, hence, international law." *Id.*

check on executive power.¹⁶⁷ But, Franck and Patel insist, the nature of war has been transformed by the advent of collective security regimes.¹⁶⁸ When countries unite their armed forces in collective security measures, their aim is not warfare but the restoration of peace and security.¹⁶⁹ In that context, Franck and Patel maintain, the multiple checks on the power of the President created by the Security Council are sufficient to satisfy the constitutional demand that there be checks on the power of the President to initiate aggressive war.¹⁷⁰ Any of the five permanent members of the Security Council can block unilateral executive action through the exercise of its veto.¹⁷¹

This teleological reading of the Constitution would make available to the Executive an alternative route to war: if the President cannot get Congress to authorize armed conflict, she can go to the Security Council and get authorization. But the Senate has expressly rejected the notion that a Security Council resolution can provide the President with authorization to commit the Armed Forces to collective security measures in the absence of congressional authorization.¹⁷² Franck and Patel respond by pointing out that, in giving its approval to the ratification of the Charter, the Senate concluded that the Security Council does not provide an alternative route to war but replaces war with collective security: "Preventive or enforcement actions by these forces under the order of the Security Council would not be an act of war but would be international action for the preservation of peace and for the purpose of preventing war."¹⁷³ Accordingly, United States participation in collective security simply does not implicate congressional war powers.

Franck and Patel's argument fails for the simple reason that the distinction between war and collective security has no validity as a matter of constitutional law.¹⁷⁴ At the urging of the Truman administration,

167. Franck & Patel, *supra* note 162, at 74.

168. *Id.* at 63.

169. *Id.*

170. *Id.* at 72-74.

171. *Id.* at 74; U.N. CHARTER art. 27, para.3.

172. See 140 CONG. REC. S10,415-33 (daily ed. Aug. 3, 1994) (rejecting, by a vote of 100 to zero, the claim that Security Council Resolution 940, authorizing measures to restore international peace and security in Haiti, rendered unnecessary congressional approval of the commitment of the Armed Forces to such measures).

173. 91 CONG. REC. 10,968 (statement of Sen. Connally) (quoting S. EXEC. REP. NO. 8, at 9 (1945)). This language is quoted approvingly in the House Foreign Affairs Committee Report on the United Nations Participation Act, H.R. REP. NO. 1383, at 7-8 (1945).

174. Raven-Hansen, *supra* note 52, at 40.

some Senators seemed to accept the distinction during discussions of the ratification of the United Nations Charter. In the decades since the ratification of the Charter, however, Congress has repeatedly rejected the distinction. The Security Council may not declare war, but, as the Persian Gulf War indicates, it can authorize collective security measures on a scale akin to that of war. Still, Congress has never recognized the authority of the Executive to authorize the Security Council to commit the Armed Forces to such security measures.

Furthermore, the Security Council consists of representatives of the executives of its member states. The Charter thus provides for no check on the power of the executives of the world to embroil their states in war or something very close to war. The Constitution does not contemplate that the entirety of the war power could be entrusted to an executive body such as the Security Council, even if that Council provides for the executive branches of numerous countries to serve as checks on the others' power to declare war. No Framer would have supported the commitment of United States troops to a collective security measure declared necessary by George Washington, in consultation with George III, Napoleon, Tsar Alexander, and Metternich.

Franck and Patel argue that, regardless of what the Framers wished, Congress delegated powers over collective security to the President when they consented to the ratification of the Charter.¹⁷⁵ Although Franck and Patel admirably annotate their argument with references to the Congressional Record, the Senators to whom they cite do not have the authority, merely by speaking in favor of a treaty, to revoke for all time Congress' traditional war powers. One point of the allocation of the vast majority of war powers to the legislative branch was to make it difficult to put the country at war,¹⁷⁶ and although Franck and Patel do not think of collective security measures as war, they are, in fact, the way the United States makes war today. Because the alternative method of committing the Armed Forces to hostilities advocated by Franck and Patel is incompatible with the constitutional allocation of war powers, it cannot provide a basis for unilateral, non-defensive executive war powers.

David Golove provides a more detailed discussion of how Congress is

175. Frank & Patel, *supra* note 162, at 74.

176. 1 FARRAND, RECORDS, *supra* note 7, at 316. (quoting James Madison as saying war was "among the greatest of national calamities"). The Framers sought to reduce the likelihood of such calamities befalling the nation by requiring that the people's representatives be consulted in decisions to commit the Armed Forces to hostilities. See *supra*, text accompanying notes 45-71.

supposed to have delegated its war powers to the President and the Security Council. Professor Golove claims that the allocation of war powers was re-negotiated in response to the failure of the Versailles Treaty.¹⁷⁷ Golove's work draws on Bruce Ackerman's theory of higher lawmaking and informal constitutional amendments.¹⁷⁸ In an earlier essay on NAFTA, Ackerman and Golove argue that the Constitution may provide textual support for unilateral executive authority to negotiate trade instruments.¹⁷⁹ Even in the absence of such textual support, however, Ackerman and Golove claim that a post-war constitutional transformation legitimated the practice of unilateral executive trade agreements.¹⁸⁰ Extending the argument about treaties into the realm of war powers, Golove contends that the advocates of collective security also established a national consensus in favor of unilateral executive power in order to facilitate cooperation in international regimes.¹⁸¹ Golove argues that the adoption of the Charter transformed the constitutional understanding of war powers.¹⁸² In the aftermath of World War II, Golove argues, Congress retained its "exclusive power over large scale conflicts," but "allow[ed] the President scope for unilateral action when cooperating with the United Nations."¹⁸³

Golove's theory focuses on the Senate's vote to grant its advice and

177. Golove, *supra* note 163, at 1495-96.

178. ACKERMAN, *supra* note 163.

179. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 813-45 (1995). For Tribe's criticisms of this argument, see Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-35 (1995) (criticizing Golove and Ackerman's analysis).

180. Ackerman & Golove, *supra* note 179, at 813-45. Golove summarizes part of the argument as follows:

With public opinion mobilized against it, a constitutional amendment [that would strip the Senate of its treaty power] pending, and the Roosevelt Administration threatening an end-run around it, the Senate blinked. It accepted the constitutional validity of the congressional-executive agreement as an alternative to the treaty procedure and proceeded to approve a host of important agreements, including the Bretton Woods Agreements, as congressional-executive agreements.

Golove, *supra* note 163, at 1497. Michael Ramsey argues that, while the Constitution does empower the President to undertake international obligations, this power is limited in two respects. Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C.L. REV. 133, 136 (1998). "First, it extend[s] only to minor, short term agreements." *Id.* Second, international obligations undertaken by the President alone are not binding law in the domestic context until implemented through domestic legislation. *Id.* at 136-37.

181. Golove, *supra* note 163, at 1507-20.

182. *Id.* at 1520.

183. *Id.*

consent to the ratification of the Charter and the passage of the United Nations Participation Act (UNPA),¹⁸⁴ which implemented the Charter in part and made it binding as domestic law. Chapter VII of the Charter empowers the Security Council to declare the existence of a threat to international peace and security.¹⁸⁵ Having made such a declaration, and having exhausted peaceful measures, the Security Council can pass a resolution pursuant to Article Forty-two of the Charter authorizing "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."¹⁸⁶ The Charter attempts to provide for such forces through Article Forty-three, which obligates members of the United Nations to enter into special agreements that designate certain national armed forces to be used in Article Forty-two enforcement actions.¹⁸⁷ In the UNPA, Congress approved in principle the idea of entering into a special agreement with the United Nations pursuant to Article Forty-three, committing the United States to contribute to a permanent United Nations force.¹⁸⁸ For Golove, the approval of the UNPA signals "a transfer of war powers from Congress to the Executive, because the United States delegate to the Security Council would be the representative of the Executive, not of Congress."¹⁸⁹

But Golove is unable to show that any actual delegation ever took place. Although Congress authorized the President to negotiate an Article Forty-three agreement, the United States never actually entered into such an agreement (nor did any other United Nation member state),

184. 22 U.S.C. § 287d (1994).

185. U.N. CHARTER art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore peace and security.").

186. UN CHARTER art. 42.

187. UN CHARTER art. 43, para. 1 (providing that all U.N. members shall enter into special agreements according to which they will make available to the Security Council armed forces, assistance, and facilities necessary for the maintenance of international peace and security).

188. 22 U.S.C. § 287d (1994). Section 287d provides:

The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of Congress . . . providing for the number and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter.

189. Golove, *supra* note 163, at 1500.

and thus no delegation of war powers took place.¹⁹⁰ In any case, as I have argued elsewhere, the UNPA would have effected only a specific and limited delegation of war powers from the Congress to the Executive.¹⁹¹ In the context of their discussion of Article Forty-three special agreements, the Senators made clear their conviction that the Charter should not be viewed as a blank check, granting the President limitless authority to commit the Armed Forces to the Security Council without congressional approval.¹⁹² Far from indicating a revolutionary transformation in the Senate's understanding of war powers, the debates on the Charter indicate that the Senate considered only a limited expansion of the President's traditional defensive war powers. The numbers contemplated in the 1949 amendment to the UNPA indicate that Congress may have considered a commitment under Article Forty-three that consisted of little more than a lightly-armed police force.¹⁹³ Moreover, as Golove notes, Congress could at any time undo the commitment it made through the UNPA, either with regard to specific United Nations authorized police actions, or globally, with respect to all actions authorized by the Security Council pursuant to Chapter VII.¹⁹⁴

Even if one is convinced by the theory of informal constitutional amendment in general, the history of United States' participation in collective security regimes does not support Golove's claim of a revolutionary transformation in the allocation of war powers. First, the

190. Negotiations among the permanent members of the Security Council to conclude Article forty-three agreements were fruitless. *Id.* at 1501 (citing U.N. Doc. S/394 (1947)). Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 464 (1991).

191. D. A. Jeremy Telman, *The Instance of Collective Security Regimes*, in *DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY* 133 (Thomas M. Franck ed., 2000).

192. Speaking of Article forty-three agreements, Senator Vandenberg stated, "we all agree that this cannot be done by executive agreement if it eliminates the voice of Congress or the voice of the Senate from the equation." 91 CONG. REC. 8000 (1945) (statements of Sen. Vandenberg). Vandenberg repeated the same point the following day. 91 CONG. REC. 8028 (1945) (statements of Sen. Vandenberg).

193. 22 U.S.C. § 287d-1 (1) (1994). The 1949 amendment to the UNPA permits the President to provide forces to the United Nations for "cooperative action" provided that: 1) the United States forces serve only as observers, guards, or in a noncombatant capacity; and 2) no more than 1000 such personnel be detailed at any one time. *Id.* Golove points to the much more significant commitment that the United States contemplated during the fruitless negotiations at the United Nations that sought to hammer out the terms of Article forty-three agreements. Golove, *supra* note 163, at 1503, n.41. It is hard to know how much weight to give to the negotiating position adopted by the executive branch, however, because the 1949 amendment to the UNPA indicates that Congress would not have accepted such a large-scale commitment of United States forces to the Security Council.

194. See *supra* note 165.

Senate's overwhelming vote in support of granting its advice and consent to the ratification of the Charter should not be mistaken for a specific approval of each of its provisions.¹⁹⁵ Following the debacle of the Versailles Treaty, the Senate concluded that the imperfect Charter was far preferable to no charter at all. Second, even if the Senate was enthusiastic about United States' participation in United Nations' authorized collective security measures in 1945, that enthusiasm found little expression in subsequent practice. As Golove acknowledges, Article Forty-three, the core of the Charter's collective security regime, fell victim to the Cold War.¹⁹⁶ At most, Golove has shown that Congress was willing in 1945 to consider a specific delegation of some part of its war powers to the President for the purposes of United States' participation in United Nations' authorized police actions pursuant to Articles Forty-two and Forty-three of the Charter. In the absence of an Article Forty-three agreement, however, the delegation never was consummated.

Professor Golove believes that he has chronicled a constitutional transformation; he seems to have chronicled only a public relations coup. He sets the stage by telling the sad tale of the demise of the League of Nations due to the crippling isolationism of a few Senators.¹⁹⁷ He then recounts a "vast political movement" organized by internationalists.¹⁹⁸ Public opinion shifted in the 1940s towards favorable views of United States participation in international organizations. Golove credits the "energetic efforts" of the internationalist camp with bringing about this sea-change in American views.¹⁹⁹ Golove also praises President Roosevelt's "impeccable sense of political timing" in recounting the administration's efforts to dampen public awareness of potential

195. 91 CONG. REC. 8190 (1945). The Senate gave its advice and consent to the Charter by a vote of eighty-nine to two. *Id.*

196. Golove, *supra* note 163, at 1501. The differences between Ackerman and Golove's persuasive arguments on behalf of NAFTA's constitutionality and Golove's less compelling arguments on behalf of unilateral executive war powers are clear. There is a long-standing practice of congressional-executive agreements in the economic realm. According to Golove, over ninety percent of our agreements since World War II have been concluded in the form of congressional-executive agreements. David Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1805, n.44 (1999). There is no analogue in the realm of war powers. On the contrary, with each new collective security agreement, Congress insists on its power to specifically authorize each individual commitment of the Armed Forces. See, e.g., NORTH ATLANTIC TREATY, Apr. 4, 1949, art. 11, 63 Stat. 2241, 34 U.N.T.S. 243 ("This Treaty shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes.").

197. Golove, *supra* note 163, at 1495-96.

198. *Id.* at 1496.

199. *Id.* at 1509-10.

constitutional challenges to the ratification of the Charter.²⁰⁰ Despite these efforts, public opinion polls taken by the State Department in 1944 “showed the public evenly divided on the issue of who should decide whether to use force in implementing collective security actions by an international organization.”²⁰¹ But such disappointing results are explained by the fact “that the State Department’s massive, and remarkably successful, public education campaign in support of the Dumbarton Oaks proposals was [just] beginning to pick up steam.”²⁰²

Golove demonstrates how public opinion was manipulated in support of ratification of the Charter, but he is unable to demonstrate that the movement from isolationism towards internationalism took deep root among the American people. Golove concedes that “there is no simple means of gauging the movement of general public opinion.”²⁰³ But the history of public response to the engagement of the United States in foreign wars since Vietnam strongly indicates that the United States has largely receded into its traditional isolationism. A constitutional transformation of the Ackerman variety has to shape public opinion over several decades; it must become a permanent part of our political culture.²⁰⁴ Golove failed to show that the delegation of unilateral war powers to the Executive in the context of collective security has attained such status.²⁰⁵

While the Supreme Court has given the treaty power broad scope, holding that it extends to “any matter which is properly the subject of negotiation with a foreign country,”²⁰⁶ the Court also observed that the treaty power may not be used to “authorize what the Constitution forbids, or a change in the character of the government.”²⁰⁷ It follows

200. *Id.* at 1511.

201. *Id.* at 1516, n.96.

202. *Id.*

203. *Id.*

204. In support of his claim of constitutional transformation, Golove cites to numerous statements made by Senators during their debate on the Charter. *Id.* at 1518 (“Senator after senator rose to give solemn speeches affirming the world historical importance of the Charter and comparing it to Magna Carta, the Declaration of Independence, the Constitution, and other momentous constitutive documents.”). While I agree that the Charter is an immensely important document, I think it is unwise to put too much stock in the pronouncements of Senators about the importance of the debate in which they are currently engaged. Regardless of the importance of the Charter, its ratification did not have to come at the expense of the constitutional allocation of war powers.

205. Golove describes Congress’ efforts to preserve its war powers in debates over the NATO Treaty as fierce. *Id.* at 1520.

206. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

207. *Id.*

that nothing can be done by treaty that is within the exclusive power of Congress, unless Congress delegates that power. My reading of the congressional debates surrounding the United Nations Charter and the UNPA leads me to conclude that Congress was prepared, in 1945, to grant only a specific, contingent, and limited delegation of war powers at that time. However, before Congress could follow through on that delegation, the Cold War intervened and prevented any such delegation from occurring. In the decades since the passage of the UNPA, Congress has never returned to the position it briefly adopted in 1945. While Congress has specifically approved of military actions undertaken on the President's initiative, it has never delegated to the President the general authority to commit the Armed Forces to hostilities without congressional authorization, regardless of whether the United States was to engage in hostilities as a sovereign nation or in concert with other nations as part of a collective security force.

This section has discussed two types of historical arguments in support of unilateral war powers. The first type of argument draws on the quasi-constitutional custom, according to which Presidents have initiated small-scale and usually defensive engagements of the Armed Forces. While the Constitution grants the President the power to "repel sudden attacks" and thus to engage the Armed Forces in order to defend the United States' territory, possessions, and citizens, the President has no constitutional power to use the Armed Forces to initiate hostilities or to embroil the United States in ongoing hostilities. Congress has never relinquished its constitutional power to control the involvement of the Armed Forces in war and in hostilities short of war. The second type of argument draws on the distinction between traditional warfare among sovereign nations and collective security measures sponsored by international organizations such as the United Nations and NATO. While Congress might conceivably delegate its power to commit the Armed Forces to participation in such collective security measures, it clearly has not done so. These historical arguments only have force if bolstered by an underlying theory of inherent executive power to engage the Armed Forces. That theory is the subject of this Article's final Part.

IV. INHERENT EXECUTIVE POWER AND THE TENTH AMENDMENT

John Marshall characterized the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁰⁸ However, given that Marshall also authored the decision in

208. 10 ANNALS OF CONG. 613 (1800). The statement came in the context of a debate

Little v. Barreme, subordinating the President's war powers to those of Congress, Marshall's words may speak to the President's ability to represent the country to foreign governments rather than to her war powers. Marshall's words are nonetheless frequently invoked by those who try to explain the extraordinary expansion of the President's foreign relations powers that has occurred in this century.²⁰⁹ While Marshall's statement is pertinent to the President's power to negotiate peace, it says nothing about her power to commit the Armed Forces to hostilities.²¹⁰ The tension between Marshall's "sole organ" dictum and the opinion he authored in *Little* encapsulates the difficulty in balancing the need for a strong unitary Executive with the requirement of a national foreign policy responsive to the will of the people, as expressed through their representatives in Congress.

A. *The Return of the Repressed: Inherent Executive Powers*

John Yoo's argument for executive power is the boldest and most sweeping because, interpreting the writings of the Framers in light of political theory and practice in the seventeenth and eighteenth centuries, he arrives at the surprising conclusion that "the Framers created a framework designed to encourage presidential initiative in war."²¹¹ Yoo's argument appears to be textual and historical in nature, but his textual and historical arguments are implausible, unless considered against the backdrop of the theory of inherent executive power. Although Yoo considers the possibility that the Framers did not make explicit the allocation of authority among the branches so that future politicians

over President's Adams' power to extradite a person charged with murder to Britain. See FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 41, at 60-61 (arguing that Marshall meant that the President is the sole organ in implementing national policy but not in making it); GLENNON, *supra* note 41, at 8 (interpreting Marshall's statement as stressing the President's duty faithfully to execute the Jay Treaty, which authorized the extradition).

209. The Supreme Court cited Marshall in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), in which the Court asserted that in the "vast" realm of foreign affairs "the President alone has the power to speak or listen as a representative of the nation." *Id.* at 319.

210. On the President's authority to make binding trade commitments on behalf of the United States, see Ackerman & Golove, *supra* note 179 (arguing that the constitutional foundations for the doctrine empowering the President to execute congressional-executive agreements are rooted in the World War II years rather than dating back to the Founding era); Golove, *Against Free-Form*, *supra* note 196 (defending the methodology he developed together with Professor Ackerman against attacks by Lawrence Tribe); Tribe, *supra* note 179 (criticizing Ackerman and Golove's theory of constitutional interpretation as represented in the 1995 article); and Ramsey, *supra* note 180 (taking an intermediate position between Ackerman and Golove on the one hand, and Tribe on the other).

211. Yoo, *Continuation of Politics*, *supra* note 41, at 170.

could negotiate the proper balance of war powers, he suggests that their silence also reflects an intention to adopt the traditional system that they knew – “executive initiative in war combined with a legislative role via the spending power.”²¹² He reaches this conclusion after extensive study of European political theory, the Articles of Confederation, and the constitutions of the individual American colonies.²¹³ While this background is by no means irrelevant, one cannot simply postulate the English practice against which the American colonies revolted and the failed Confederation as models informing the drafters of the Constitution.²¹⁴ Yoo’s theory ignores the great efforts expended in the Revolutionary Era to free the United States from the problems associated with the excesses of executive power experienced when the American states had the status of English colonies.

Yoo attacks what he calls “law-office history” in which quotations are torn out of context and inserted wherever they appear useful to a legal argument. He chastises other scholars for “dredging up a few selective quotes from famous Framers at the Philadelphia Convention.”²¹⁵ According to Yoo, scholars such as John Hart Ely, Michael Glennon, Louis Henkin, Harold Koh, and Jane Stromseth rely on a “trilogy” of quotations from the Framers indicating their intent to vest the war power in the legislature.²¹⁶ As the quotations provided in this Article

212. *Id.* at 241; *see also* Yoo, *Clio at War*, *supra* note 108 (criticizing the historical methodology of legal scholars working in this field and arguing that the Framers expected the political branches to struggle for control over war).

213. In *Continuation of Politics*, Yoo devotes twenty pages to a discussion of war powers under what he calls “the English Constitution” and an additional twenty pages to the war powers under state constitutions and the Articles of Confederation. Yoo, *Continuation of Politics*, *supra* note 41, at 196-241. In *Clio at War*, Yoo takes as the starting point for his analysis of the Declare War Clause “the phrase’s meaning in significant Founding era legal documents, principally the British Constitution in the seventeenth and eighteenth centuries, the state constitutions, and the Articles of Confederation.” Yoo, *Clio at War*, *supra* note 108, at 1172.

214. The Framers “specifically rejected the British model that allowed the monarch to take the country to war and to exercise exclusive control over foreign policy.” Fisher, *Unchecked Wars*, *supra* note 42, at 1637; *see also id.* at 1665 (“It is impossible to compare what Locke and Blackstone advocated to what the Framers provided in Articles I and II without concluding that the Framers repudiated the British model on war powers.”). Harold Koh concurs, noting that the Framers denied the President the power to declare war “thereby rejecting the English model of a king who possessed both the power to declare war and the authority to command troops.” KOH, *supra* note 41, at 76.

215. Yoo, *Clio at War*, *supra* note 108, at 1174.

216. *Id.* at 1179-86. Yoo discusses quotations from James Madison, James Wilson, and Joseph Story. *Id.* Yoo claims that the Madison quotation carries little weight because it derives from a private letter. *Id.* at 1183. Joseph Story is no authority for Yoo because he was born after the Revolution and cannot claim the status of a Framers. *Id.* at 1181.

demonstrate, however, there is a great deal more evidence available than Yoo is willing to acknowledge. While Yoo is correct in criticizing the “law-office” approach to constitutional history, Yoo does not make a compelling argument for his alternative methodology. It is not at all obvious that the political treatises Yoo surveys are helpful in explaining the intents of the Framers in allocating war powers as they did in the Constitution. Yoo similarly fails to explain why we should think that the allocation of powers in state constitutions sheds any light on the desired allocation in the federal government.²¹⁷ Yoo’s decision to look to pre-constitutional sources may be strategic; the Constitution itself and its legislative history provide very little support for his position. Noting that a neutral observer “would marvel at how much Presidents have spun out of so little,” one scholar concludes that the text “tilts decisively towards Congress.”²¹⁸

The Framers had a clear enumeration of executive power in mind when they drafted the Constitution. Speaking at the Federal Convention in 1787, Alexander Hamilton announced:

The authorities and functions of the executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the departments of finance, war, and foreign affairs; to have the nomination of all other officers, (ambassadors to foreign nations included,) subject to the approbation or rejection of the senate; to have the power of pardoning all offences except treason, which he shall not pardon without the approbation of the senate.²¹⁹

Madison added that exclusive executive powers do not include the

Wilson’s statement, Yoo claims, addresses federalism concerns as much as it does separation of powers. *Id.* at 1184.

217. Yoo introduces his discussions of state constitutions with conclusory statements that cite to no authority: “The Framers’ experience under the colonial and revolutionary state government provided the second frame of reference for their thinking on war powers.” *Id.* at 1197. He says that “[b]y studying the evolution of state constitutions, we can better understand the Constitution and war powers as part of the Framers’ attempt to cure legislative excess by erecting a unitary, independent executive in the form of the presidency.” Yoo, *Continuation of Politics*, *supra* note 41, at 218.

218. REVELEY, *supra* note 41, at 29.

219. 5 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 205 (Johnathan Elliot ed., 2d ed. 1996).

powers of putting the country in a state of war or peace.²²⁰ Other representatives to the Federal Convention harbored still more limited views of executive power. Roger Sherman considered the Executive to be nothing more than an instrument for carrying out the will of the Legislature.²²¹ James Wilson simply stated that he did not view the prerogatives of a British monarch to be a proper guide for establishing the powers of the American President.²²² War and peace were in his view legislative prerogatives.²²³ The only strictly executive powers that Wilson was willing to allow were those of executing the laws and appointing officers.²²⁴ Even Alexander Hamilton insisted that the President's powers as Commander-in-Chief were to be "much inferior" to the powers of the King of Great Britain.²²⁵ While the President commands the Armed Forces, the King could declare war and raise and regulate fleets and armies.²²⁶ The Constitution grants those additional powers to the Legislature.²²⁷

The President's power as Commander-in-Chief is clearly a war power, but the Framers subordinated that power to congressional war powers by providing that the United States should not possess a standing army. The designation "Commander-in-Chief" may not have been intended to confer any substantive authority to use the Armed Forces except as directed by Congress.²²⁸ It does not appear that the Framers contemplated any significant role for the President as Commander-in-Chief in peacetime.²²⁹ Hamilton stated that "[t]he President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."²³⁰ James Iredell, speaking in the North Carolina ratifying convention, reminded his colleagues that:

The President has not the power of declaring war by his own

220. *Id.* at 439.

221. *Id.* at 140.

222. *Id.* at 141.

223. *Id.*

224. *Id.*

225. THE FEDERALIST NO. 69, at 350 (Alexander Hamilton) (Buccaneer Books 1992).

226. *Id.*

227. THE FEDERALIST NO. 69, at 448 (Alexander Hamilton) (Buccaneer Books 1992).

228. HENKIN, *supra* note 41, at 26.

229. REVELEY, *supra* note 41, at 64-65.

230. THE FEDERALIST NO. 69, at 344-350 (Alexander Hamilton) (Buccaneer Books 1992). Hamilton, one of the staunchest defenders of executive power, stressed that "[t]he President is to be Commander in Chief of the army and navy of the United States, and of the militia of the several States only when called into actual service of the United States." THE FEDERALIST NO. 74, at 376 (Alexander Hamilton) (Buccaneer Books 1992).

authority, nor that of raising fleets and armies. These powers are vested in other hands With regard to the militia, it must be observed, that though he has command of them when called into the actual service of the United States, yet he has not the power of calling them out. The power of calling them out is vested in Congress.²³¹

On this interpretation, the President's powers as Commander-in-Chief are simply an instance of her power to execute the laws of Congress.

Yoo's survey of eighteenth-century theorists indicates that the Executive traditionally held power over the Armed Forces, but the language these theorists used in defending the traditional position signals how inapposite it was as a model for the new Republic. "The king is con[s]idered, in the next place, as the generali[ss]imo, or the fir[s]t in military command, within the kingdom [I]t follows therefore, from the very end of it's [*sic*] in[s]titution, that in a monarchy the military power mu[s]t be tru[s]ted in the hands of the prince."²³² Joseph Story's commentaries on the Constitution bring home the American perspective:

The power of the president, too, might well be deemed safe; since he could not, of himself, declare war, raise armies, or call forth the militia, or appropriate money for the purpose; for these powers all belonged to Congress. In Great Britain, the king is not only commander-in-chief of the army and navy and militia, but he can declare war; and, in time of war, can raise armies and navies, and call forth the militia of his own mere will.²³³

The Framers flat-out rejected the theory of executive power that Yoo claims they incorporated into the Constitution.

In the face of all of this evidence, Yoo's textual and theoretical argument must fail on its own terms. Yoo claims to refute the authority of three statements made by the Framers, but there are dozens of others.²³⁴ More significantly, Yoo's argument ignores the way in which the Constitution allocates powers and some of its basic principles. Yoo eschews the law-office approach, but even a law-office historian would be

231. ELLIOT, *supra* note 22, at 107-08.

232. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 254 (University of Chicago Press 1979).

233. STORY, *supra* note 26, at § 1492.

234. The central importance to the Framers of vesting the powers of war in the Legislature is evident from James Madison's fourth and very public Helvidius letter, in which he wrote, "In no part of the Constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department War is . . . the true nurse of executive aggrandizement." Madison, Helvidius 4, *supra* note 40, at 174.

hard pressed to find textual evidence in support of the proposition that the Framers were committed to entrusting the Executive with the power to put the United States at war or even to commit the Armed Forces to hostilities absent a threat to its territories or citizens. More to the point, while the scholars Yoo criticizes utilize quotations from the Framers to bolster their arguments, the main thrust of their approach tends to rely not on original intentions but on broader structural arguments about the design of the Constitution and its role in the historical development of the federal powers over peace and war. It is ironic that Yoo, who claims to be a member of the originalist camp,²³⁵ should fashion an argument that is so modern in origin. Although the extent of the President's defensive war powers were never clearly defined, no officer or organ of the United States government asserted the President's constitutional power to initiate war until after World War II.²³⁶

B. The Clash of Theories: Inherent versus Limited Executive Power

Advocates of executive power propose the ancient doctrine of inherent executive power as a means of resolving difficulties surrounding the source of the federal government's powers over foreign affairs. The theory of inherent executive power is similar to the delegation theories discussed above in that it does not rely on any explicit constitutional grant of power to the Executive. However, while delegation theories require an explicit or implicit congressional grant of authority to the Executive to exercise power not granted to the Executive in the Constitution, the theory of inherent executive power posits certain powers that are inherent in the very notion of an Executive and therefore require no explicit enumeration.²³⁷ The theory of inherent executive authority ultimately derives from the political tradition to which Yoo refers, that of the progressive theorists of the European Enlightenment. These theorists postulated the need for the concentration of certain powers in the hand of the monarch. To these powers they gave the name "executive prerogative." Under the old monarchical system, the King

235. Yoo, *Clio at War*, *supra* note 108, at 1173.

236. WORMUTH, *supra* note 41, at 133; ELY, *supra* note 41, at 10-11; *see also*, Fisher, *Unchecked Presidential Wars*, *supra* note 42, at 1637 ("For the most part, the Framers' model [placing the power of war and peace with the legislative branch] prevailed from 1789 to 1950.").

237. *See generally* Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863 (1983) (providing a general discussion and critical commentary on the Supreme Court's failure to develop a consistent theory regarding when the President can act without express constitutional or statutory authority).

was assumed to have powers not explicitly delegated elsewhere. According to Blackstone, “the king is and ought to be absolute . . . [U]nless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go, and no farther.”²³⁸ In the American context, the argument for the President’s inherent power is based on the principle that all powers traditionally exercised by the monarch are assigned to the President, unless the Constitution specifies otherwise.

John Locke argued that the good of society requires that the Executive enjoy discretion to deal with problems that the Legislature might be unable to foresee.²³⁹ For Locke, executive prerogative included the power to act without specific legal authorization or even in contravention of the law in certain circumstances.²⁴⁰ These circumstances included instances where dispatch is required, where laws are inadequate to provide for all accidents and necessities of public concern, and where the Executive must have some latitude to do things not prescribed by law.²⁴¹ Locke imposed theoretical limits on this executive prerogative, but he did not articulate those limits in very helpful ways. Locke believed that executive power was only legitimate when it was exercised for the public good,²⁴² but he provided no clear guidelines for determining who has the power to decide when the exercise of executive power is in the public interest. Blackstone limited the theory of executive prerogative to areas of exclusive executive power: “By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.”²⁴³ The theory applies only to those rights and capacities that the king alone enjoys and not to those he shares with others.²⁴⁴

Alexander Hamilton revived the theory of inherent executive power in his first *Pacificus* letter, written in defense of President Washington’s decision unilaterally to declare the United States’ neutrality in the wars that erupted in 1793, as the European monarchies confronted the new

238. BLACKSTONE, *supra* note 232, at 248, 250.

239. LOCKE, *supra* note 1, § 159.

240. *Id.* § 160.

241. *Id.* Eugene Rostow may well be informed by this Lockean tradition when he claims that “the President may act, and in some instances he must act, even though Congress may also act but has not yet done so.” Cooper, *supra* note 66, at 190 (comments of Eugene V. Rostow).

242. LOCKE, *supra* note 1, at §§ 159, 161.

243. BLACKSTONE, *supra* note 232, at 239.

244. *Id.*

French Republic.²⁴⁵ The United States had treaty obligations to France under 1778 treaties of amity and commerce²⁴⁶ and alliance.²⁴⁷ The status of these treaties was unclear once the French revolutionary government succeeded that of Louis XVI. Hamilton interpreted the general grant of all executive power to the President to mean that all governmental power that is not judicial or legislative in character is executive power.²⁴⁸ “The general doctrine then of our constitution is, that the EXECUTIVE POWER of the nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument” – these exceptions included the Senate’s participation in the appointment of officers and the making of treaties, and the power of the Legislature “to declare war and grant letters of marque and reprisal.”²⁴⁹ Hamilton concluded that the treaty-making power, including the power to decide whether or not the United States is obligated to go to war, is a concurrent power and that the President has the power to suspend or continue treaties.²⁵⁰

It is perhaps not surprising that Hamilton, an eighteenth-century thinker, would be attracted to the theory of inherent executive power, but it is surprising that the theory has attracted support from twentieth-century enthusiasts of executive power as well. Madison found the doctrine of inherent executive power “extravagant” and “extraordinary.”²⁵¹ He noted that Hamilton got his ideas from the writings of people like Locke, Vattel, and Montesquieu, who wrote with monarchical governments in mind.²⁵² For Madison, it was perfectly clear that the power to declare war and make treaties could never fall within a

245. Alexander Hamilton *Proclamation of Neutrality*, in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 120, at 430-31. The background of the *Pacificus* and *Helvidius* letters is discussed in JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 355-57 (1996).

246. Treaty of Amity and Commerce, U.S. — Fr., 8 Stat. 12, 18(2) Stat. 203, Act Separate and Secret, 17 Stat 795, 18(2) Stat. 213, T.S. no. 83 (Feb. 6, 1778), annulled by ch. 67, 1 Stat. 578 (1798).

247. Treaty of Alliance, U.S. — France, 4 Stat. 6, 18(2) Stat. 201 T.S. No. 82, February 6, 1778, annulled by ch. 67 1 Stat. 578 (1798).

248. Alexander Hamilton, *Pacificus Letter*, *supra* note 67, at 37-39.

249. *Id.* at 39 (emphasis in original).

250. *Id.* at 42. Hamilton stated that:

[T]he participation of the senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly — and ought to be extended no further than is essential to their execution.

Id.

251. Madison, *Helvidius I*, *supra* note 40, at 143.

252. *Id.* at 144.

proper definition of executive powers, since all executive acts presupposed the existence of the laws to be executed: "A declaration that there shall be war, is not an execution of laws: it does not suppose pre-existing laws to be executed: it is not, in any respect, an act merely executive."²⁵³ For Madison, the doctrine of checks and balances mandated that the legislature control the decision to go to war:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.²⁵⁴

Madison was convinced that Locke allocated the foreign relations power to the Executive²⁵⁵ because Locke lived in a monarchy.²⁵⁶ In a republic it was more appropriate to endow the Legislature with that power.

Yoo has argued that there is little evidence to support exclusive congressional war powers.²⁵⁷ However, in the context of the debate between Hamilton and Madison (as Pacificus and Helvidius respectively), we find the Framers repeatedly opposing Hamilton's arguments in favor of unilateral, non-defensive war powers. Although he concurred with Washington and Hamilton as to the policy of neutrality, Jefferson sided with Madison in this case, arguing that "a declaration of neutrality was a declaration [that] there should be no war, to which the executive was not competent."²⁵⁸ Even Eugene Rostow, one of the most inveterate defenders of executive prerogative in this area, acknowledges that Washington's proclamation of neutrality would have been without effect had Congress not passed a neutrality act that implemented the proclamation.²⁵⁹

The inapplicability of the theory of executive prerogative to the war

253. *Id.* at 145.

254. *Id.* at 148 (emphasis in original).

255. LOCKE, *supra* note 1, at §§ 146, 148. Advocates of unilateral, non-defensive war powers thus cite to Locke as envisioning a system of government in which the Executive has broad discretionary powers, especially in the realm of foreign affairs. See, e.g., Cooper, *supra* note 66, at 167 (remarks of Charles J. Cooper); Yoo, *Continuation of Politics*, *supra* note 41, at 199-200.

256. Madison, *Helvidius I*, *supra* note 40, at 145.

257. See *supra* text accompanying notes 193-200.

258. Letter from Thomas Jefferson to James Madison (June 23, 1793), in 15 THE PAPERS OF JAMES MADISON 37 (T. Mason, R. Rutland & J. Sessions eds., 1985).

259. Cooper, *supra* note 66, at 190 (comments of Eugene V. Rostow).

powers of the President should be clear to the reader. The theory fails under Blackstone's definition of executive prerogative, because war powers are not within the President's exclusive authority.²⁶⁰ Locke's understanding of executive prerogative is more far-reaching because Locke grants the Executive the power to exercise the prerogative in certain emergency situations. Under the Constitution, however, the Tenth Amendment intervenes to prevent a transfer of powers vested in the Legislature to the Executive. The President may exercise war powers only subject to congressional authorization or approval. The Tenth Amendment fixes the allocation of federal powers and prevents the Executive from asserting extra-constitutional powers.

V. CONCLUSION

If there were some ambiguity as to the allocation of war powers under the Constitution, the argument for unilateral, non-defensive war powers could be justified. However, the Constitution repeatedly and insistently allocates war powers to Congress and to Congress alone. The President's constitutional war powers are extremely limited, coming into existence only when Congress has authorized the use of force. However, when we consider the history of the United States, we first recall innumerable instances of bold executive action independent of congressional decision-making. Such a view of United States history obscures the role of Congress in approving and authorizing executive action. On closer scrutiny, the quasi-constitutional custom of unilateral, non-defensive war powers turns out to be nothing more than a pattern of post-hoc congressional approval for executive acts that would not be legal in the absence of such approval. While the post-war era has seen a sudden blossoming of theories of unilateral, non-defensive war powers, there has been no congressional delegation of those powers. On the contrary, the War Powers Resolution indicates that, in response to executive self-aggrandizement, Congress has used its legislative powers to reinforce its constitutional powers.

Defenses of unilateral, non-defensive war powers thus only make sense if they derive from an argument that the President actually shares war powers with the Legislature, even if the Constitution does not make that power-sharing arrangement explicit. Hence the significance of the argument for inherent executive powers. There seems to be nothing to oppose this argument because it requires no textual justification, and its historical justification lies in the centuries before the founding of the

260. See text *supra* accompanying note 220.

United States. The theory of inherent executive powers appeals to our common-sense notion (and to our lingering Cold War sensibilities) that the President must be empowered to make rapid or secret decisions in times of crisis. But common sense must yield to the clear language and structure of the Constitution. The Tenth Amendment does not merely address abuses of federal legislative power; it expresses the general theory of limited government that is at the heart of our constitutional system. By stating the supposed truism that whatever is not delegated is retained, the Tenth Amendment precludes the doctrine of inherent executive power from having any applicability to the government of the United States.

While the constitutional allocation of war powers is clear, this paper has addressed several arguments designed to push that allocation in the favor of executive power. Because these arguments are without strong textual or historical foundation, they rely, ultimately, on the theory of inherent executive authority, a doctrine that cannot be reconciled with the Tenth Amendment, viewed as a statement of the Constitution's design of limiting each branch of the federal government to the exercise of delegated powers. While those powers can be implied or express, there is no basis, in the constitutional text, in the writings of the Framers, in political theory, or in the constitutional history of the United States for transferring powers invested in the Legislature to the Executive.

